SUPREME COURT, U. S.
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No. ~~1426~~

In the
Supreme Court of the United States

OCTOBER TERM, 1967

HAROLD Z. KAPLAN, Shareholder in, suing derivatively for and on behalf of all shareholders for the benefit of: ONE WILLIAM STREET FUND, INC., a Maryland corporation, ENERGY FUND INC., a Delaware corporation, THE DOMINICK FUND, INC., a Delaware corporation, CHEMICAL FUND, INC., a Delaware corporation; and HAROLD Z. KAPLAN and FREDERICK L. DUNN, DANIEL B. DUNN, CHARLOTTE F. DUNN and NANCY L. DUNN, Minors, by next friend and parent, LILA DUNN, Shareholders in, suing derivatively for and on behalf of all shareholders for the benefit of: THE LEHMAN CORPORATION, a Delaware corporation,

Petitioners,

vs.

LEHMAN BROTHERS, a partnership; GOODBODY & CO., a partnership; DOMINICK & DOMINICK, INCORPORATED, a corporation; UNKNOWN MEMBER ORGANIZATIONS OF THE NEW YORK STOCK EXCHANGE TRANSACTING BROKERAGE BUSINESS FOR CHEMICAL FUND, INC. and other Defendant-Funds; PAINE, WEBBER, JACKSON & CURTIS, a PARTNERSHIP; THE NEW YORK STOCK EXCHANGE, ONE WILLIAM STREET FUND, INC., a Maryland corporation; ENERGY FUND INC., a Delaware corporation; THE DOMINICK FUND, INC., a Delaware corporation; CHEMICAL FUND, INC., a Delaware corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered on

January 4, 1967, which affirmed the order of the United States District Court for the Northern District of Illinois, Eastern Division granting respondents' motion for summary judgment.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported in 371 F. 2d 409. It is printed in the Appendix attached to this petition at p. 10a. The opinion of the District Court is reported in 250 F. Supp. 562 and is also printed in the Appendix at p. 1a.

JURISDICTION

The judgment of the Court of Appeals was entered January 4, 1967 and is hereinafter set forth at p. 12a. No rehearing was sought by petitioners. The time for filing a petition for certiorari was extended to May 26, 1967 by orders of Mr. Justice Clark entered on April 4, 1967, May 4 and 22, 1967.

The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the adoption and enforcement of an agreement by the New York Stock Exchange and its members to charge brokerage commissions on the basis of uniform, minimum rates, and their adherence to such rates under coercive Exchange sanctions, is immunized by the Securities Exchange Act of 1934 (15 U.S.C. §78 *et seq)* from the operation of Section 1 of the Sherman Act (15 U.S.C. § 1) declaring agreements in restraint of trade illegal?

2. Whether the Securities Exchange Act of 1934, the self-regulatory scheme it established allowing registered exchanges to fix reasonable rates of commission, and the scheme of regulatory oversight assigned to the Securities and Exchange Commission over reasonable rates of commission by § 19 (b) of that Act impliedly repealed the operation of the antitrust laws to the agreement of the New York Stock Exchange and its members fixing uniform minimum rates of commission, although said agreement was never approved by the Commission or found by it to be in furtherance of the Act's reasonable rate standard or its substantive aims and purposes to protect investors?

3. Does the self-regulatory scheme created by the Securities Exchange Act of 1934 permit respondents to adopt a uniform, minimum rate fixing agreement so as to impliedly repeal the antitrust laws irrespective of whether such agreement is economically unjustifiable, results in unreasonable and unconscionable profits, discriminates against large institutional traders, artificially inhibits members from offering competitive rates contrary to their willingness and ability to do so, and so operates as to corrupt fiduciary duties and produce large scale conflicts of interest between mutual funds, their investment advisers and Exchange brokers?

4. Is the Securities Exchange Act of 1934 scheme of S.E.C. regulatory oversight over rates so pervasive as to impliedly repeal the antitrust laws' application to respondents' uniform, minimum rate-fixing agreement, nothwithstanding the fact that the S.E.C. never held a rate hearing, never issued a rate order, never compiled a rate record, never made a rate finding and never defined the Act's standard of reasonable rates or articulated the criteria applicable to such definition?

5. Is respondents' rate fixing agreement exempt from the antitrust laws when New York Stock Exchange members themselves subvert the fixed rate concept by handling institutional brokerage business (almost 50% of public round-lot trading) at 30% to 40% of fixed rates, but their uniform commission rate agreement prohibits the "saving" from accruing back to the institutional traders?

6. Under the standard of "reasonable rates of commission" as set forth in Section 19 (b) of the Securities Exchange Act of 1934, does the New York Stock Exchange and its members have the right to legislate their own antitrust immunity by merely adopting uniform, minimum rates in conflict with the antitrust laws and filing same with the S.E.C., and if such self-legislated immunity requires no affirmative S.E.C. approval, is not such self-regulatory power an unconstitutional delegation of legislative power to a non-governmental, private business group?

7. Where investors have no effective remedy permitting them to trade on the New York Stock Exchange at reasonable rates or to recover damages for unreasonable rate overcharges except under the antitrust laws, is it not imperative to preserve such remedy?

STATUTES INVOLVED

The statutes which the case involves are:

1. Section 1 of the Sherman Anti-Trust Act (15 U.S.C. § 1);
2. Sections 4 and 16 of the Clayton Act (15 U.S.C. § § 15 and 26); and
3. Sections 2, 6 (b) and (d), 15A as amended, and 19 (b) of the Securities Exchange Act of 1934 (15 U.S.C. § § 78b, 78 f (b) and (d), 78 o—3(b) (8) and 78 s (b).

The full text of these statutes insofar as here pertinent is set forth in the appendix to this petition, *infra*, pages 12a-17a.

The Securities Exchange Act of 1934 is hereinafter referred to as "the 1934 Act" or "the Exchange Act" and the Sherman and Clayton Acts are referred to as "the antitrust laws."

STATEMENT OF THE CASE

This action was brought pursuant to 15 U.S.C. § 15 by petitioners derivatively on behalf of five large mutual funds against the New York Stock Exchange (hereafter, "NYSE") and five of its member firms to recover treble damages sustained by reason of respondents' agreement fixing uniform minimum rates of brokerage commission and their adherence to and enforcement of same in violation of the Sherman Antitrust Act, 15 U.S.C. § 1 (A. 3-35).[1] Other relief of a declaratory and injunctive nature was also sought, the effect of which would restrain the NYSE from interfering with the rights of individual NYSE members to set their own competitive minimum rates of commission (A. 29).

In response to the Amended Complaint respondents filed a motion for summary judgment with a supporting affidavit (A. 36-65). Plaintiffs filed a Counteraffidavit[2] and subsequently, sought to file a cross motion for summary

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[1] All reference to (A.—) are to petitioners' appendix filed in the court below and references to (App.—) are to the appendix attached to this petition.

[2] Because of the size of the Counteraffidavit the Clerk of the Court below did not bind it up with other parts of the record or assign record page numbers to it. Reference to the Counteraffidavit is made to its own page numbers, abbreviated herein i.e. (Counteraffidavit, 27) or to an exhibit therein, i.e. Counteraffidavit Exhibit 7.)

judgment together with a Supplemental Affidavit.[3] The trial court denied petitioners' leave to file said motion and Supplemental Affidavit and also denied petitioners' application to file the Supplemental Affidavit in opposition to respondents' motion. The trial court entered summary judgment for the respondents (A. 80-89), which order was affirmed on appeal by the Court below (App. 12a). Hereinafter set forth are relevant matters herein as developed by the pleadings and affidavits.

The mutual funds on whose behalf this suit was brought by petitioners are engaged in the business of investment of the funds of their stockholders. A major portion of this investing is in stocks of the corporations listed and traded on the NYSE. The purchase and sale (collectively trading) of said stocks is transacted primarily through the facilities of the NYSE through members brokers. Such trading is subject to NYSE commission law (A. 45-52).

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[3] The Court below granted petitioners leave to file their Supplemental Affidavit as part of the record although leave to file said document was denied by the District Court. The sole references made hereto to matters contained in the Supplemental Affidavit are to public documents incorporated therein comprising public statements and correspondence of S.E.C. Chairman Cohn. The sources of these utterances are identified in the Supplemental Affidavit.

The Court below excused printing of petitioners' Counteraffidavit and Supplemental Affidavit as well as a separately bound Appendix of Exhibits. Petitioners also filed in the District Court sundry exhibits denominated "Source Exhibits" consisting of the five part Record of Special Study of Securities Markets of the Securities Exchange Commission, House Document No. 95, 88th Congress, 1st. Sess. The New York Stock Exchange Fact Book 1965 and the NYSE Annual Report, 1965. The Securities and Exchange Commission Special Study in hereinafter referred to as the Special Study. Printing of said source exhibits was also excused.

The NYSE is an unincorporated association owned by its members. Its sole object as set forth in its Constitution is to furnish facilities for the transaction of member business, to maintain high standards of commercial honor and integrity and to promote just and equitable principles of trade. The Exchange itself carries on no commercial activity, and its Constitution declares no economic aim or purpose for itself or its members. The government of the Exchange is vested in its Board of Governors. The Board has authority to prescribe rules, but provisions in the Constitution (including those relating to its rate fixing law) can only be adopted or altered by majority vote of the total membership. (A. 20-21)

The NYSE is the nation's primary trading market. About 90% of the dollar trading in all NYSE listed shares traded on all exchanges is traded on the NYSE. And, of the remaining 10%, NYSE members, as dual members of regional exchanges, trade upwards of 60%. (Counteraff. 3). NYSE members, in 1964, dominated the government of virtually all important regional stock exchanges as well as the National Association of Securities Dealers, Inc. (the only association of over-the-counter brokers registered with the S.E.C.) (A. 27). NYSE members also dominated trading volume in the over-the-counter market where NYSE minimum rates are the prevailing brokerage rates. The minimum rates prevailing on the NYSE are and have been the rates adopted by regional stock exchanges, with respect to NYSE listed issues. In summary, NYSE members transact over 90% of all brokerage business in stocks in the United States.

"The avowed objectives of organizing the NYSE, in 1792, were the setting of minimum commission rates and the establishment of a preference for members of the Exchange in their dealings with other members * * *." Special Study, Part 2, p. 295. In furtherance of these objectives,

the Constitution of the Exchange, adopted by the membership, contains provisions governing every phase of membership, access to the Exchange market, and the charging of commissions. These provisions are collectively referred to as "commission law"[4] and provide, among other things, that commissions shall be charged and collected at rates not less than prescribed rates and shall be net and free from any rebate, return, discount or allowance made in any manner or by any method of arrangement, direct or indirect (A. 34). Other key provisions of commission law perfect and uphold the objective sought by the minimum rate concept, as follows:

First, only members can trade on the NYSE, and its Constitution limits membership to 1,366 natural persons (an increase of only 266 members since the year 1879) thus establishing a monopoly market. (Counteraff. 21-23). The limitation on the number and availability of memberships, together with the enormous increase of trading volume on the Exchange in the last three years, has resulted in the rising price of a seat which reflects the value of trading access to the Exchange at fixed non-competitive rates[5] (NYSE Annual Report, 1966, p. 24).

Second, a major structural characteristic of commission law is the charging of the same commission rate, based

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[4] Relevant portions of commission law are set forth in the Amended Complaint (A. 31-34).

[5] One effect of the premium price of a seat is to exclude membership of thousands of registered professional securities dealers who are unable to afford a seat. An antitrust action raising this point is now pending against the NYSE alleging that its commission law effects a concerted exclusion of all non-member brokers from participation in profitable intercourse (via shared commissions) on business referred to Exchange members for execution on the Exchange. *Thill Securities Corp.* v. *the New York Stock Exchange,* 63 C 264 (E.D. Wis.)

on the value of the round lot (100 shares), for each transaction regardless of size.[6] The commission on an order for 5,000 shares is exactly fifty times that of an order for 100 shares.[7] Volume traders that buy or sell in blocks of 1,000 shares or more, e. g. mutual funds represented by petitioners and other institutional investors, are allowed no discount or rebate whatever (Counteraff. 50).

Third, a major advantage of membership in the Exchange is in the preferential brokerage rates accorded to members on their own trading as principals for their own account (Supp. Aff. 187). A member trading 100 shares of stock at a market price of $40.00 per share pays a commission of only $7.70 at NYSE "internal rates" compared to the non-member rate of $39 ($7.70 of which goes to cover the same internal services). This internal commission is paid to other NYSE members for floor brokerage (actual execution of the transaction) and clearance (exchange of cash, certificates and bookkeeping). An institutional investor placing an order for 5,000 shares directly with a floor-broker (and by-passing the commission house) is required, by commission law, to pay

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[6] Commission law prescribes a separate schedule of rates applied to trades of odd-lots (less than 100 shares). Such trades are handled on the floor of the Exchange by two odd lot dealers who share a duopoly in such trading. In addition to the NYSE prescribed rates, these dealers add on a charge of their own, called the "odd lot differential." The NYSE and the odd-lot dealers are presently defendants in an antitrust suit alleging an antitrust conspiracy in fixing the rate of the "odd-lot differential." *Eisen* v. *Carlisle & Jacquelin, et al,* 66 C. 1265 (S.D. NY.)

[7] As noted in the reply of an institutional trader to a questionnaire prepared by the Special Study, Part 2, p. 320: "It costs little, if any more, to execute single trades of 5,000 or 10,000 shares than it does for 1,000 or 100 shares."

the full $39 rate per hundred shares to the floor broker. The funds represented by petitioners are not qualified under the NYSE Constitution to be member corporations of the Exchange. As a consequence, mutual funds, along with other institutions trading on the NYSE must trade through Exchange members at commission rates that provide no relief from NYSE prescribed schedules adopted to the 100 share unit of trading. Indeed, commission law prohibits members from even making a proposition for the transaction of business at less than minimum prescribed rates (A. 34).

Fourth, before a member is allowed trading privileges he must sign a written pledge to abide by the Constitution, as amended from time to time, and all rules adopted pursuant thereto. In addition, all allied members of the Exchange (all partners of members, or holders of voting stock in member corporations) must sign such pledge. (A. 32). A member or allied member adjudged guilty of violating the constitution of the Exchange may be suspended or expelled by the Board of Governors (A. 32). The Exchange has punished members violating commission law (A. 39).

All of the aforementioned provisions were in force when on September 11, 1934, the NYSE filed its application for registration as a national securities exchange under the 1934 Act (A. 39). The application incorporated the Constitution of the Exchange (A. 39). Seventeen days after such filing the S.E.C. entered an order registering the Exchange (A. 53). There is no record of any proceeding in connection with the order granting registration, and the S.E.C. does not regard the order of registration an opinion of the S.E.C. (Appendix of Exhibits, Ex. 39). The order of registration itself noted the limitations of time to consider the evidence supporting the application

(A. 53). In view of the fact that the Exchange Act makes it unlawful to trade on an exchange unless it is registered, a delay would have had the effect of closing the NYSE.[8]

As noted, commission law is adopted by the Exchange membership on a one-man, one-vote basis. But, the Exchange membership is essentially split into two camps. The majority of NYSE members are what is known as floor professionals (stock specialists, independent floor brokers, odd-lot dealers and their associate odd-lot brokers, and floor traders). (Counteraff. 26). These floor professionals have little or no direct contact with the investing public. A minority number of the memberships in the Exchange are held by persons engaged in the public brokerage business. Although twenty-five member organizations in the NYSE receive almost 50% of all commissions arising from public trading, these firms contain only 7% of the members of the Exchange. NYSE members and member organizations accounting for only 10% of all commissions hold 60%. of the memberships. (Counteraff. 29). In 1961, Merrill, Lynch, Pierce, Fenner and Smith, Inc., the Exchange's largest brokerage organization, accounted for 13% of all commissions on the NYSE, but it contained only 11 members, .81% of the total (Counteraff. Ex. 4).

Since 1934, the Exchange membership has voted on only two aspects of commission law, rate increases and the allowance of discounts to large traders. The NYSE membership vote on the last four out of five rate increases was as follows:

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[8] Page 1 of the Application for Registration stated in part, "* * * this application for registration is made solely in order to avoid penalties imposed upon an exchange by said act." New York Stock Exchange, by Richard Whitney, President.

Year of Rate Increase	*Yes*	*No*	*Percentage Voting Against Increase*
1938	523	413	44%
1942	779	206	21%
1953	639	530	45%
1958	646	593[9]	48%

Voting is by secret ballot, making it impossible to reconstruct an economic relationship (re: the amount of commissions attributable to each vote) between those voting for or against the increase. The S.E.C. never polled members to determine if those voting against the increase in fact accounted for more commission business than members voting for the increase (Counteraff. 31 & Ex. 8).

Only once in the 175 year history of the Exchange (in 1953) has the issue of a discount been put to a member vote. Notwithstanding the recommendation of the majority of a NYSE special committee urging adoption of discounts, the Exchange membership defeated the proposal by a vote of 573 to 532, 48% of the votes being in favor of the discount (Counteraff. 65).

[9] Merrill Lynch filed a minority report vigorously opposing the 1958 rate increase proposal (Appendix of Exhibits, Ex. 36). Commission law compelled it to adopt the increase with resultant enormous profits (Counteraff. 49).

Each increase raise approved by the Exchange membership was recommended on the basis of studies and formal reports of a special committee of the Exchange (A. 40). Copies of such rate raises, as approved, were furnished the S.E.C. as required by the 1934 Act (A. 40). Respondents' affidavit attached to their motion for summary judgment sought to establish that each rate raise was reviewed and analyzed by the S.E.C. which thereafter did not object (A. 40-44).[10] However it appears that the S.E.C. has never "held public hearings on * * * commission rates and it has never exercised its powers under Section 19 (b) to alter or supplement the Exchange's rules relating to commission rates" (Appendix of Exhibits, Ex. 40). Nor is there any norm or criteria by which the reasonableness of such rates could be ascertained. (Counteraff. 40; Special Study, Pt. 2, p. 343).

The ineffectiveness of S.E.C. review of Exchange rates is shown by the Special study is as follows (Counteraff. 39, 40);

a) "Since the enactment of the Exchange Act in 1934, the NYSE has amended its non-member commission rate

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[10] Respondents' affidavit is conspicuous for what it fails to allege. It does not allege, for example, that the NYSE ever filed a report with the S.E.C. justifying uniform rates or no-discounts or reciprocal gives-ups or that commission law and practice was reasonable; nor did any report ever define reasonable rates or rate structures or specify any particular percentage or range of percentage or profit in relation to the 1934 Act's standard of reasonable rates. Similarly, the affidavit did not allege any facts with respect to its own rate review during the 25-odd year period when the five rate increases were adopted. Insofar as commission law prohibits the allowance of discounts but permits reciprocal give-ups of commission and that these matters are part and parcel of minimum rate commission structure, the affidavit is totally silent.

five times. Each of the increases was recommended by a special committee of the Exchange in a formal report which became the basis of the Exchange's proposal." (Special Study, Pt. 2, p. 329)

b) "The underlying data used by the Commission in reviewing each rate change have essentially been those which the NYSE has supplied at the time of its proposal * * * (except for 1942). The data supplied by the Exchange has been limited by the scope of its samples and the contents of its report forms." (Special Study, Pt. 2, p. 342).

c) "In no instance has any particular percentage or change has been limited by the scope of its samples and Exchange or the Commission in relation to Section 19b's reasonable standard or the concept of 'fair return' as used by the 1942, 1947 and 1958 Exchange committees (and possibly others)." (Special Study, Pt. 2; 337).

(d) "The significant point is that, despite the Exchange's numerous references to a profit percentage and its several mentions of 'fair return' as seemingly the ultimate criteria of 'reasonable rates,' there seems never to have been any clear articulation of the significance of the amount or percentage of profits, or of any other quantitative standard, as a measure of a fair return or of the reasonableness of a particular rate schedule." (Special Study Pt. 2, 337).

(e) "Neither the Commission nor the Exchange has articulated what principles apply in relating the profit percentage to return on capital, when the former is the sole or primary element remaining to be measured or whether other elements are encompassed." (Special Study Pt. 2; 336).

(f) "Nor is it clear, assuming that the profit percentage is deemed to have broader coverage than return on capital, exactly what relationship it is thought to bear to the general statutory standard of reasonableness, i.e., whether any particular percentage of profit is indicative of the reasonableness or unreasonableness of any particular level of rates." (*ibid.*)

The Decision Below

The court below affirmed the judgment of the trial court which was interpreted "as holding that the antitrust laws are inapplicable to the New York Stock Exchange insofar as its prescribing of minimum commission rates is concerned" (App. 11a). The affirmance appears to be based upon the following:

a. *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963) stands for the proposition that although the 1934 Act contains no express exemption from the antitrust laws, a repeal thereof is to be regarded as implied if necessary to make that Act work (App. 11a);

b. Section 19 (b) of the 1934 Act authorizes the S.E.C. to alter or supplement rules of exchanges with respect to such matters, among others, as the fixing of reasonable rates of commission (App. 10a);

c. The fixing of uniform minimum commission rates is an exercise of the Exchange's self-regulatory function under Section 19 (b) because the fixing of such rates is one method of regulating commission rates (App. 11a);[11]

[11] Of course, no one could deny this oversimplification. However, it is completely irrelevant to this case since the self-regulatory function of the Exchange under Section 19(b) is not to fix *just any rates* but to fix *reasonable rates* which under that Section must be those which

d. The antitrust laws and the 1934 Act cannot be construed as showing a congressional intention to permit an antitrust suit based on the Exchange's agreement relating to rates of commission charged by its members (App. 11a).[12]

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[11] (Continued)

"are necessary or appropriate for the protection of investors." The aims of the 1934 Act in this regard, referred to in thirty-six sections of the Act, as noted by Judge Clark in *Baird* v. *Franklin*, 141 F. 2d 238, 244 (2nd Cir. 1944), were completely ignored both in the Court below and the trial court.

Nor does the Court below indicate why uniform minimum rates are necessary to make the 1934 Act work, thus making its reliance on *Silver, supra* irrelevant also.

[12] The basis and authority for this statement remain undisclosed by the court below.

REASONS FOR GRANTING THE WRIT

I.

THERE IS AN URGENT NEED TO CLARIFY THE APPLICABILITY OF THE ANTITRUST LAWS TO THE EXCHANGE ACT'S STANDARD OF REASONABLE RATES AND THE ACT'S SCHEME OF EXCHANGE SELF-REGULATION AND S.E.C. REGULATION.

A. The Effect of the Decision Below Frustrates The 1934 Act's Objectives to Protect Investors.

The case at bar presents to this Court for the first time the important issue of whether the agreement of the NYSE and its members which fixes minimum rates of brokerage commission is vulnerable to the antitrust laws as a restraint of trade or is impliedly exempted therefrom by the 1934 Act. Necessarily comprised therein is the issue of the applicability of the antitrust laws to enforce a substantive standard of the 1934 Act, *i.e.* "reasonable rates of commission" (15 U.S.C. § 78 s (b) (9), in the light of the primary and basic aims and purposes of the Act to protect investors.

These issues were adversely decided against investors in the court below which found such an implied exemption upon a misapplication of *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) and upon a misconstruction of congressional intent in the enactment of the 1934 Act. The basis for its decision, that the Exchange may fix minimum rates of commission because the 1934 Act permits it to fix reasonable rates in order to make the Act work, is illogical; it ignores the starting premise of the 1934 Act that rates be reasonable in order to protect in-

vestors.[13] As a result the NYSE and its members, under the guise of self-regulation, are permitted to perpetuate a rate-fixing scheme in restraint of trade which solely rewards their own self-interest and which lacks any redeeming

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[13] Petitioners are aware that it is not the office of a petition for certiorari to fully argue the merits of the questions presented. However, in support of the above statement, it is pointed out that *Silver*, pp. 361-363 emphasized substantive fulfillment of the aims and purposes of the 1934 Act before antitrust immunity could be implied as to any activity of the Exchange. It stands for proposition that where NYSE collective action imposes an antitrust restraint which frustrates rather than furthers the 1934 Act's aims and purposes, the application of the antitrust laws to the restraint does not create any conflict between the two statutory schemes. Instead, the antitrust laws are to be regarded as "peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable." And "denial of their applicability would defeat the congressional policy reflected in the antitrust laws without serving the policy of the Securities Exchange Act." (*Silver*, p. 360)

The court below did not apply these principles but disposed of the issues on the narrow, unevaluated and simplistic approach that fixed minimum rates are nothing more than permissible self-regulation under the 1934 Act. Such an approach is totally divorced from the Act's aims and purposes and their effective fulfillments to protect investors against unreasonable rates. Nothing in the record made by respondents or in the decision supports any contention that minimum rates are necessary to make the 1934 Act work.

On fundamentals there is complete harmony between the 1934 Act standard of reasonable rates and antitrust laws standards of competitively reasonable rates (via its prohibition of rate-fixing agreements). Both achieve a similar goal, protection of the public against unreasonable rates. An application of the antitrust laws to respondent's rate fixing agreement rather than conflicting with the 1934 Act's standards, serves to implement and fulfill it.

virtue of furthering any aim or purpose of the 1934 Act to protect investors. Respondents did not attempt in the record here to make any showing that its fixed minimum rates do further such aims.

It is true, of course, that after such rates are fixed the S.E.C. is authorized to alter or supplement them pursuant to the standards of Section 19 (b) of the 1934 Act. The decision below, however, was not supported by any recognition of such powers of oversight in the S.E.C. as bearing on the question of implied repeal. Even if it had there are nevertheless serious questions here as to the pervasiveness of such oversight insofar as it bears upon the reasonableness of fixed rates. This is pointed out by the S.E.C. in its discussion on this subject in its Special Study, Part 2, p. 343 as follows:

> "The statute (Exchange Act) imposes the general standard of reasonableness without further definition. It is the kind of general standard that needs to be given consent in the course of administration; yet after nearly 30 years there has been no comprehensive and consistent public articulation on the part of the Exchange or the Commission, of the principles or criteria to be applied in interpreting the standard."

As of May, 1967, neither the Exchange nor the S.E.C. has yet defined what reasonable rates are, or identified what criteria are applicable to a definition. The scheme of self-regulation and S.E.C. regulation may be discussed and debated *ad infinitum,* but the fact remains that without a starting definition of reasonable rates (and applicable rate criteria) there never could be and never has been responsible, legitimate, justified, good faith or arguably lawful compliance or even attempted compliance with the standard. Without a definition, the standard itself is meaningless. The combined failure of the Exchange and

the S.E.C. to define the standard constitutes the most complete breakdown and failure of a regulatory scheme in the annals of American administrative law.

Reasonable rates either mean "something" or the statutory standard is a nullity. The consequence of a meaningless standard is the denial of protection the standard is supposed to provide. Rates and rate structure are economic stuff, and the only meaningful and workable hypothesis of reasonable rates is economic reasonableness. Section 2 of the 1934 Act itself recites no competitive or economic policy whatever, nor does it contain any special or protective policy which might conflict with the concept of economic reasonableness. Moreover, the Exchange Act does not empower exchanges or the S.E.C. to innovate economic policy. Reasonable rates of commission are the sole rate standard and the immediate frame of reference. Cf. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 79-80 (1944). There is no more persuasive evidence of the purpose of a statute than the words by which Congress undertook to give expression to its wishes. *United States* v. *American Trucking Ass'ns.,* 310 U.S. 534, 543 (1940).

B. The Interests of a Great Segment of the National Economy is Adversely Affected by the Decision Below.

At the current trading volume the investing public is currently now paying over $1.2 billion annually for the privilege of trading on the NYSE at uniform fixed minimum rates. About 35-40% of this amount is being paid by institutional investors (including banks administering private trusts), without the benefit of discounts.[14] Mutual

[14] Facts in the record, based on statistical data available through 1965, show that institutional trading comprised approximately 40% of total public (non-member) trading on the NYSE. At the Investment Bankers Association

funds alone are paying about $100 million annually to trade on the Exchange, and a substantial portion of these commissions are, as a result of the prohibitions against discounts or rebates, diverted into reciprocal give-ups.

Over twelve million persons own shares listed on the NYSE and over three million persons own shares in mutual funds. These investors, both institutional and otherwise, ought to be able to trade on the NYSE at reasonable rates and rate structure. They constitute a huge segment of the national economy. Obviously the decision below must have serious impact on them, emphasizing the importance of the resolution by this Court of the questions here presented, particularly insofar as institutional investors are concerned. In this connection, it is pointed out that between 1949 and 1964 the holdings of NYSE listed stocks by financial institutions went from $9.7 billion to $97.7 billion, percentagewise from 12.7% to 20.6%. If one includes NYSE listed stock held in personal trusts administered by banks at year-end 1963, out of a total of $411 billion value in all NYSE listed stocks, institutions and bank trusts held approximately $150 billion. In 1963, institutions accounted for 23.9% of total share volume, but this figure is about 30% of public volume (at full commission rates), since total volume comprises members' own trading (about 20% of the total). In 1965, institutions accounted for 31.4% of total shares traded, or

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[14] (Continued)
55th Annual Convention, in November, 1966, S.E.C. Chairman Cohen stated: "We estimate that currently about one-half of the total public commission income of NYSE members of round-lot transactions is attributable to transactions by institutions."

about 39% of public volume. In the 1966 NYSE study,[15] institutions accounted for 34.8% of the total dollar volume of shares traded, compared to 38.4% by individuals (non-members). Of the total dollar volume of shares traded by non-members, institutional volume in 1966 was approximately 45%.

In 1963, institutional investors paid at least $210 million in commissions on their trading on the NYSE, at uniform minimum, no-discount rates. In 1965 mutual funds alone paid over $100 million in commissions,[16] the major portion of which (70 to 80%) arose from trading on the NYSE. This sum reflects the striking growth of NYSE trading volume in the last few years, from $47.3 billion in 1962 (as cited in *Silver*), to $73.2 billion in 1965[17] and $98.6 billion in 1966.[18]

The resolution of the questions presented here is of further importance to institutional investors since the uniform, fixed rates of the Exchange affect them in two unique respects. First, such rates provide no graduated discount for the larger transactions in which the institutions tend to deal,[19] and, second, they are based on a cost structure which includes the cost of services other than the basic brokerage function—ancillary services of little or no interest or value to institutional investors. The

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[15] NYSE 14th Public Transaction Study, as related in Investment Dealers Digest, March 20, 1967, pp. 6 and 66.

[16] Source: Report of the S.E.C. on the Public Policy Implications of Investment Company Growth published December 2, 1966, cited *infra* as S.E.C. Report.

[17] Source: NYSE Fact Book, 1966, published by the NYSE in April, 1966.

[18] Source: Statistical Bulletin of the S.E.C., March, 1967, p. 10.

[19] In terms of trading patterns, a NYSE study in 1963 revealed that blocks of 1,000 shares or more made up 46.4% of all shares traded by institutions and intermediaries, compared to 32.6% in 1960.

effect of fixed rates charges institutional investors for unwanted ancillary services and deprives them of trading on the Exchange, using only the essential services required to effect transactions, and not having to pay for anything else.

As noted in the Special Study, Part 2, page 311: the question comes down to whether a commission rate favoring the volume buyer or seller might be justified by savings to the member in brokerage, sales, back office promotion or other expenses. The mechanics, time and back office expense of executing a 5,000 share trade are substantially the same as a 100 share trade. Minimum, no-discount rates simply exact from institutional traders fifty salesmen commissions, fifty units of partners compensation and fifty profit units.

The failure of the Exchange's Commission Law to provide for graduated discounts has given rise to another evil which the S.E.C. is apparently powerless to correct. This evil from the standpoint of institutional shareholders, arises from the unjustified profitability in handling institutional brokerage business in blocks. As a result, NYSE member brokers are willing to and do handle the brokerage business of mutual funds for 60-70% *below* the minimum rate schedules prescribed by the NYSE constitution. But, NYSE commission law absolutely prohibits members from rebating the "saving" back to the institutions placing the business. Commission law does, however, allow members to split commissions among one another, and does allow traders to direct the executing broker to split his commission, *i.e.* to direct what NYSE members shall receive the split and in what proportion. Under NYSE commission law, millions of dollars in brokerage fees (at NYSE rates) are directed to be split (given-up)

to ot er NYSE brokers who have performed no service to the mutual fund. This division of commissions is known as a directed split or reciprocal give-up of commissions.

The reciprocal give-up is commonly employed by the investment advisers managing mutual funds to reciprocate brokers for selling shares in the mutual fund itself. Since investment advisers are paid management fees by mutual funds based upon the asset values of the funds they manage, the sale of additional mutual fund shares increases asset value and management fees. But no benefit accrues to the fund itself or its stockholders by reason of the sale of more shares. Institutional block traders, and especially mutual funds, are thus in a position to direct vast amounts of commission business in a manner which serves the purpose suited to benefit solely the group exercising the trading power. Commission law prevents the funds themselves from benefitting from their trading power (and the willingness of NYSE brokers to execute such brokerage at less than 50% of prescribed rates) in the form of discounts of rebates.

As stated in the Special Study, Part 4, p. 234:

> "This unbalanced reciprocal structure is a direct outgrowth of a minimum rate structure which prohibits volume discounts and rebates."
>
> "Ultimately the solution of the problem lies at their source: the NYSE minimum commission rate schedule. So long as the funds cannot themselves benefit from the economies created by their mass purchasing power the complexities and potential problems of the third party beneficiary system will continue."

The problems involved in reciprocal give-ups are numerous and complex. These problems were first given

attention in the Wharton Report of 1962 and, thereafter, in the Special Study of 1963. Substantial excerpts from these reports were incorporated in petitioners' Counter-affidavit in support of the *per se* unreasonableness of fixed-rate commission law. (Counteraff. 55-62b).

On July 18, 1966, the S.E.C. staff, in a letter sent to all registered exchanges, noted that customer directed give-ups were inconsistent with the premise that fixed rates of commission were necessary or appropriate to the effective operation of the Exchange.[20]

Not until December 2, 1966, did the S.E.C. itself formally condemn give-ups and recommend their elimination.[21] That recommendation, if adopted, would simply allow NYSE brokerage firms which now give-up 60-70% of their commissions on institutional business to retain 100% of commissions. As noted in the S.E.C.'s Report, page 17: "Existing regulatory controls have neither curbed the growth of reciprocal and give-up practices nor dealt with the basic regulatory problems[22] they

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[20] This letter recommended elimination of give-ups, saying: "The directed give-up also seriously complicates the administration and assessment by the Exchanges and the Commission of the reasonableness of commission rates since commissions received and retained cease to be related to the expenses incurred for services rendered in the execution of brokerage orders * * on the Exchange." CCH, Securities Law Reporter, Number 108-117, August 10, 1966, Par. 77,360, page 82,665.

[21] Report of the S.E.C. on Public Policy Implications of Investment Company Growth, House Rep. No. 2337, Cal. No. 1046, 89th Cong., 2nd Sess.

[22] Among the problems of give-ups are the conflict of interest of a mutual fund adviser, and, especially, where such adviser, as in the case of plaintiff funds, is a member of the Exchange. While such adviser-member executes brokerage at 100% of Exchange rates, other NYSE

pose."[23] As of now, the NYSE membership has neither eliminated give-ups, nor adopted discounts, nor permitted members to effect rebates.

The denial of discounts and the use of reciprocal give-ups of commission conclusively establish the unreasonableness, arbitrariness and hypocrisy of fixed minimum rates and are therefore within the questions here presented. Under no conceivable economic, ethical, fair or equitable principles of trade as referred to in the 1934 Act can fixed rates, the denial of discounts and the use of reciprocal give-ups be deemed in compliance with the 1934 Exchange Act's reasonable rate standard.

This failure to comply affects, as earlier noted, over $1 billion a year in brokerage commission. There can be little doubt that the applicability of the antitrust laws to

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[22] (Continued)
brokers are handling other fund business at 30-40% of NYSE rates plus give-ups. And, there is also a problem of the breach of fiduciary duties of the adviser to the fund when brokerage business is placed and give-ups are directed so as to benefit the adviser rather than the fund. The use of give-ups involves NYSE brokers (and especially members who are also investment advisers) in a scheme which diverts away potential savings to the funds, and arguably violates provisions of the Investment Company Act of 1940 and the Investment Advisers Act of 1940. On January 12, 1967 the Wall Street Journal reported that ten stockholder derivative suits were filed by mutual funds alleging that the use of give-ups breached duties imposed by these Acts, and resulted in the payment of excessive brokerage fees.

[23] As noted on page 185 of the S.E.C. Report the practice of give-ups "impair the orderly and proper functioning of the securities markets themselves. * * * Give-up practices have been tolerated * * * only because brokerage costs are fixed by the *exchange minimum commission rate schedules.*" (Emphasis Supplied)

respondents' uniform rates will have the immediate consequence of competitively reducing commissions by 10-20% generally on individual trading and by 60 to 70% on institutional block trading. If such savings are to be denied to investors, such denial should rest on substantial legal grounds. The opinion below is deficient in authority or argument justifying a summary judgment on petitioners' claim. If objectives are to be balanced, how does one balance the objective of fulfilling reasonable rates via the antitrust laws and saving investors at least $200 million a year in commissions as compared to ratifying a regulatory scheme that is all shadow and no substance! The effect of the decision below affirms a regulatory illusion as a defense to an antitrust claim.

II.

THE ERRONEOUS APPROACH TAKEN BY THE COURT BELOW CONFLICTS WITH PRINCIPLES ENUNCIATED IN THIS COURT'S OPINIONS GOVERNING THE APPLICATION OF THE DOCTRINE OF AN IMPLIED REPEAL OF THE ANTITRUST LAWS. AS A RESULT OF THIS APPROACH AN ERRONEOUS DECISION HAS BEEN RENDERED, THE EFFECT OF WHICH GIVES THE NEW YORK STOCK EXCHANGE MEMBERSHIP CARTE BLANCHE TO OVERRIDE THE ANTITRUST LAWS WITHOUT ANY REQUIRED SHOWING THAT SUCH ANTITRUST CONDUCT IS LEGITIMATE, JUSTIFIED SELF-REGULATION OR THAT IT SERVES SUBSTANTIVE AIMS AND PURPOSES OF THE EXCHANGE ACT. THE DECISION PERMITS THE NYSE TO OVERRIDE THE ANTITRUST LAWS WITHOUT THE INVOLVEMENT OR APPROVAL OF THE SECURITIES EXCHANGE COMMISSION, AND RESULTS IN MAKING THE NYSE A LAW UNTO ITSELF.

Dismissal of petitioners' case preserves intact a rate-fixing agreement among NYSE members now in its 175th

year. A decision of such practical magnitude to the investing public, as heretofore shown, ought to rest on sound grounds supported by substantial authority. Instead of taking an approach which thoroughly and exhaustively examined underlying issues, especially economic issues and consequences, the court below adopted a superficial approach which did little more than summarily invoke an implied antitrust repeal. Its basis for invoking such repeal is in conflict with principles set forth in a number of opinions of this Court and requires review and reversal.

A. The Court Below Ignored Consideration of Established Principles of Law Essential To A Proper Decision In The Case At Bar.

The first principle is that the antitrust laws represent fundamental pro-competitive economic policy, and that in the absence of an immunity, the securities business like any other form of interstate trade is subject to the Sherman Act. *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 360 (1963); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 372 (1963); *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 215 (1966); *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 4-5 (1957); *United States* v. *Morgan,* 118 F.Supp. 621 (S.D.N.Y.).

Second, "(R)epeal of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-351 (1963); *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 217-218 (1966). Cf. *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963); *United States* v. *Borden Co.,* 308 U.S. 188 (1939); *Georgia* v. *Pennsyl-*

vania R. Co., 324 U.S. 439, 456-457 (1945); *California* v. *Federal Power Comm'n*, 369 U.S. 482, 485 (1962).

Third, the doctrine of implied repeal will only be invoked in the context of multiple safeguards provided by a pervasive regulatory scheme. *Pan American World Airways* v. *United States*, 371 U.S. 296 (1963); *Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963); *United States* v. *R.C.A.*, 358 U.S. 334, 346-350 (1959); Cf. *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 133 (1941).

Fourth, when a private antitrust action for treble damages with respect to a rate fixing agreement is subject to approval by a regulatory agency, the action should be stayed rather than dismissed pending agency determination of antitrust issues, where the agency has jurisdiction over such issues. *Carnation* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966). Inasmuch as the Exchange Act prescribes no mode of S.E.C. approval to defendants' rate fixing agreement and prescribes no S.E.C. jurisdiction over the antitrust issue implicit therein, the case at bar argues even more forcefully for at least a stay, rather than a dismissal, than did the *Carnation* case, *supra*.

Fifth, "(R)epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work and even then only to the minimum extent necessary." *Silver*, *supra*, 373 U.S. 341, 357. Dismissal of the case at bar implied a repeal to the maximum extent, not in furtherance of the 1934 Act, but simply to exonerate respondents from treble damages.

Sixth, investor protection is a keystone of the 1934 Act. *Silver*, *supra*, 373 U.S. 341, 352-353; *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1963); *Baird* v. *Franklin*, 141

F.2d 238; Loomis, *"The S.E.C. as Amicus Curiae,"* A.B.A. Journal, Vol. 52, No. 8, p. 750, (August, 1966).

Seventh, rates fixed by agreement or conspiracy are unreasonable *per se*. *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 489 (1950); *United States* v. *Trenton Potteries,* 273 U.S. 392, 396-398 (1926); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 218 (1940). Price-fixing schemes are also an unfair method of competition. *Federal Trade Comm'n* v. *Beech-Nut Packing Co.,* 257 U.S. 441 (1922). And the concerted denial of quantity discounts has been held to be an unreasonable restraint of trade. *Sugar Institute* v. *United States,* 297 U.S. 553, 594-595 (1936).

Eighth, a combination to fix rates, to monopolize or restrain trade through a membership device or participation in a plan or submission to a coercive device violates the Sherman Act. *Associated Press* v. *United States,* 326 U.S. 1, 19 (1945); *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 227 (1938); *United States* v. *Masonite Corporation,* 316 U.S. 265, 275 (1942); *United States* v.; *Paramount Pictures, Inc.,* 334 U.S. 131, 161 (1948).

Ninth, the freedom of individual business units to compete unhindered by the group action of others is one of the aims of the antitrust laws. *Silver, supra,* 373 U.S. 341, 359-360; *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U.S. 457 (1941); *Anderson* v. *Shipowners Ass'n.,* 272 U.S. 359, 364-365; *United Mine Workers of America* v. *Pennington,* 381 U.S. 657, 668 (1965).

Tenth, the fact that the Exchange is to some extent a regulated entity does not confer a *per se* immunity to either the Exchange or its members. *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 456 (1945). The Exchange Act

was not intended to be used as a member device "to engage in predatory practices at will." Cf. *Maryland & Va. Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 465-466 (1960).

Eleventh, where judicial enforcement of the antitrust laws would remove the clog of rate-fixing agreement and all the interrelated restraints embodied in commission law, such enforcement aids rather than hinders the S.E.C. in its tasks. Cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 460; *Silver, supra*, 373 U.S. at 359; *Pan American World Airways* v. *United States*, 371 U.S. 296, dissent, Mr. Justice Brennan, at 330.

Without a starting approach to the case at bar which recognized these starting principles, the court below could not have and did not resolve the ultimate issue pursuant to this Court's direction to invoke an implied repealer of the antitrust laws "only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Silver, supra*, 373 U.S. at 357.

B. The Approach Adopted By the Court Below Is In Conflict With This Court's Opinion In the Silver Case, and Allows the Exchange Membership to Legislate Its Own Antitrust Immunity Via So-Called Self-Regulation Regardless Of Its Justifiableness Or Compatibility With The Aims and Purposes Of The 1934 Act.

The court below adopted an "approach" which held that since the workings of self-regulation under Section 19 (b) of the Exchange Act includes rates, and minimum commissions are one method of regulating rates, in order for the Exchange Act to "work" it is necessary to immunize minimum rates from the antitrust laws. This "ap-

proach" amounts to an absolution. It is totally divorced from the standard of reasonable rates, divorced from the substantive aims and purposes of the Exchange Act, and ignores entirely the function of the antitrust laws as "peculiarly appropriate as a check upon anticompetitive acts of exchanges." *Silver, supra,* 373 U.S. at 360. Instead of taking an approach seeking a reconciliation between the Exchange Act and antitrust schemes, the court below did not even perceive any need to attempt such reconciliation. Instead, it adopted an approach whereby exchange self-regulation is assumed to be so pervasive as to allow the exchange to legislate its own antitrust immunity by simply adopting a rate-fixing agreement in conflict with the antitrust laws and filing it with the S.E.C. This approach emphasizes self-regulation as an end in itself. Congress can hardly have been deemed to have intended to authorize exchanges to legislate their own antitrust repeal in furtherance of no more clearly delineated a standard than reasonable rates. The overtones of unconstitutionality are too grave. *Schechter* v. *United States,* 295 U.S. 495 (1935). Cf. *American Power & Light Co.* v. *S.E.C.,* 329 U.S. 90 (1946).

The *Silver* case, *supra,* at 352 noted that the Exchange Act created a federally mandated duty of self-policing and self-regulation. But the exercise of self-regulation was held not to give rise to a blanket antitrust immunity. *Silver, supra,* at 357. Before an implied immunity might arise the particular application of self-regulation had to pass muster as legitimate, justifiable and justified. *Silver, supra,* 373 U.S. at 358, 359, 361-362, 364-366. All of this was related to the fundamental proposition recognized in *Silver* that self-regulation was not an end in itself.

The obvious conflict between the opinion below and *Silver, supra,* is that the court below relieved the Ex-

change from any specific duties or tests pertaining to rate-regulation. All rates or rate structure adopted under §19(b) seemingly inherit an antitrust immunity no matter how invidious their design and intent to restrain trade, no matter how unjustified or illegitimate they are or lacking in any redeeming virtue. It would seem that Congressional benevolence in providing an antitrust dispensation of such magnitude should be supported by substantial authority, none of which was cited by the courts below.

If unjustified procedure is a basis for applying the antitrust laws, as it was in *Silver*, how much more persuasively does the case at bar argue for such application. The gravity of mischief that can be wrought in the guise of unchecked self-regulation (absent pervasive regulatory oversight) is nowhere greater than in the area of economic rate-regulation. Yet the court below adopted an approach summarily exempting respondents' rate scheme from the antitrust law without so much as a finding that it was perpetuated in good faith or was arguably lawful in compliance with the 1934 Act's reasonable rate standard. Under this approach, Exchange self-regulation over rates carries no accompanying duties to justify rates and rate structure. No scheme adopted by Congress which expressly provides for an antitrust immunity permits the immunity to arise independent of agency approval or action. Yet the immunity invoked below is based on nothing more than respondents' unjustified perpetuation of a rate-fixing scheme in obvious conflict with the antitrust laws. The immunity merely serves to congratulate respondents' commercial cunning. The approach thus adopted by the court below confers a blanket antitrust immunity to virtually everything done by the Exchange membership in the guise of self-regulation under Section 19(b) of the Exchange Act. That is the dangerous precedent this Court is asked to review.

C. The Approach Taken By The Court Below Invokes An Antitrust Immunity Without Finding That The S.E.C. is a Pervasive Regulatory Authority With Jurisdiction To Decide Antitrust Issues. The Decision Below Therefore Conflicts With the Philadelphia National Bank and the Federal Power Commission cases.

The decision below invoked an implied antitrust immunity without a concommitant finding that the S.E.C. is a pervasive regulatory authority over commission rates and structure, and over competitive factors with respect thereto, nor was a finding made that the S.E.C. has power to decide antitrust matters. This "approach" is in conflict with this Court's opinions in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 351-352 (1963) and *California* v. *Federal Power Comm'n.,* 369 U.S. 482 (1962).

An issue in the instant case is the pervasiveness of the S.E.C.'s regulatory authority over Exchange-member rates and rate structure. The core need of that pervasiveness is the safeguard it provides against anticompetitive abuses (restraints of trade) adopted and perpetuated in the guise of rate self-regulation. Absent a check upon such abuses via pervasive regulatory safeguards, investors are entirely at the mercy of the respondents. NYSE-member commission law and practice offers a classic example of concentrated economic power and anticompetitive abuses unchecked by a pervasive regulatory authority and, as decided below, unchecked by the antitrust laws.

If, as the court below held, the antitrust laws were not applicable to respondents' rate-fixing agreement, in lieu of that safeguard it was imperative to find that the S.E.C. was a pervasive regulator over rates and rate structure. But, all the court below did was to state that "it is important to note" that the S.E.C. has power under

§19(b) of the Exchange Act to alter or supplement exchange rules in respect to the fixing of reasonable rates of commission (App. 10a). To what extent this provision comprises a pervasive regulatory scheme, if at all, the court below did not say.

There are two aspects to the issue of a pervasive regulatory authority, the statutory scheme itself, and how it operates in fact. The latter is especially important because the degree of S.E.C. involvement with rate structure is, after all, the measure of investor protection afforded by the agency as well as a reflection of the nature and extent of its self-considered rate regulatory duties.

Had the court below considered the issue of regulatory pervasiveness it would have been hard put to find it. As S.E.C. Chairman Cohen recently observed, "* * * Congress did not establish a comprehensive scheme of Federal Regulations in the Federal Securities laws, particularly in the economic sphere * * *" (Supp. Aff. Ex. 29, p. 1). The 1934 Act itself declares no economic policy and no competitive policy. The S.E.C. has discretion but no duty to review rates, approve rates or hold a rate hearing. The Act does not assign the S.E.C. a role of oversight over unfair methods of competitive or discriminatory practices, nor is it assigned broad remedial powers with respect thereto. If and when the S.E.C. reviews commission rates, there is no duty upon it to consider the factor of competitiveness or to give that factor any weight or to enforce any clearly delineated competitive standard. The oblique scheme of S.E.C. rate regulatory oversight prescribed by the Exchange Act is a model of vagueness and uncertainty. It bears no resemblance to the kind of scheme held pervasive in *Pan American World Airways* v. *United States,* 371 U.S. 296 (1962); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 351 (1963).

In only one area of S.E.C. jurisdiction is enforcement compliance involving an antitrust issue vested in the S.E.C. That involves approval of a merger of utilities under the Public Holding Company Act of 1935, 15 U.S.C. §79j. Section 7 of the Clayton Act, as amended, 15 U.S.C. §18 specifically excludes jurisdiction of the Federal Trade Commission over such mergers. Section 11 of the Clayton Act, 15 U.S.C. §21 (a) excludes Federal Trade Commission authority over transactions duly consummated pursuant to authority given to various regulatory agencies, but the S.E.C. is not among them. Yet even these exceptions to Federal Trade Commission jurisdiction do not constitute a grant of power "which it does not already possess" to adjudicate antitrust issues. *California* v. *Federal Power Commission*, 369 U.S. 482, 486-487, 490 (1962). Where, then, does the S.E.C. have jurisdiction to decide antitrust issues?

The overwhelming non-pervasiveness of the S.E.C.'s regulatory involvement, not merely with rates and rate structure but with all Exchange operations, occupies a major part of the Special Study. The court below did not cite a single instance where the S.E.C. exercised its §19(b) powers over rates, for the simple reason that the S.E.C. never has. The dangerous precedent established is that unused regulatory power, power guided by no clearly delineated competitive standard and direction, constitutes regulatory pervasiveness sufficient to invoke an antitrust immunity. If S.E.C. rate power is pervasive, the S.E.C. seems unconcerned about it. After 33 years and the NYSE's adoption of five rate increases (at minimum rates), the S.E.C. has never convened a rate hearing or instituted a formal rate investigation, nor has it ever required the NYSE to justify the basis upon which Exchange members collect well over $1 billion annually in

commissions at uniform, no discount rates coupled with the practice of reciprocal give-ups. Insofar as administrative review must be based upon a record, substantial evidence, findings and conclusions, no such review has ever been undertaken by the S.E.C. with respect to NYSE-member rates and rate structure. The rudiments of the administrative process have never begun to operate on commission rates and rate structure, much less operate pervasively. Without a definition of reasonable rates to begin with there could be no S.E.C. rate review; yet, so non-pervasive is the Exchange Act scheme that the S.E.C. has never conceived a duty under it to articulate a definition.

Between 1958 (the last year a rate increase was adopted) and 1966, the investing public has paid NYSE-members over $6 billion in commissions, pursuant to NYSE commission law. This fantastic sum is based on nothing more substantial than a superficial 15 page report filed by the NYSE with the S.E.C. in 1958 (the year of the last rate increase). (Appendix of Exhibits, Ex. 6) Cf. the voluminous 855 page record made by the Secretary of Agriculture in fixing *maximum* commission rates under a statutory standard of reasonable rates. *Tagg Bros. & Moorhead* v. *United States,* 280 U.S. 420 (1930), Oct. Term, 1929, No. 45, Transcript of Record, Vol. 1 & 11.

In 1965 the S.E.C. sought to enlist Congressional support to amend the Exchange Act so as to clearly delineate standards guiding S.E.C. rate review power and to expressly provide for judicial review of any failure by the S.E.C. "to give proper weight to antitrust considerations." (Supp. Aff. Ex. 23 and Ex. 29). Thus, while the S.E.C. itself recognized fatal deficiencies in the Exchange Act

scheme with respect to its regulatory role over antitrust issues, the court below did not.

The S.E.C.'s Investment Company Report in December, 1966, page 13, recommended amendment of the Investment Company Act of 1940 to provide that all compensation paid to mutual fund advisers be subject to the standard of reasonableness pursuant to detailed, delineated guidelines expressly including the competitive factor. The S.E.C. also recommended an amendment expressly allowing a remedy to recover damages for excessive compensation. *The very things lacking* in the Exchange Act scheme to confer pervasive regulatory oversight in the S.E.C. comprise amendments now urged by the S.E.C. with respect to enlarging its regulatory duties over the Investment Company Act. What the S.E.C. apparently now regards as essential to its having antitrust jurisdiction over management rates charged mutual funds by their investment advisers, the court below rejected *sub silentio* as inapposite to the S.E.C.'s antitrust jurisdiction over reasonable rates of commission. The respective views of the court below and the S.E.C. are irreconciliable. Clearly, the S.E.C. does not share the view of the court below that Section 19(b) of the Exchange Act confers pervasive regulatory power in the S.E.C. or power to decide antitrust issues.

III.

THE APPROACH TAKEN BY THE COURT BELOW IMPLIED AN INTENT BY CONGRESS TO AUTHORIZE EXCHANGES TO FIX UNIFORM MINIMUM RATES OF COMMISSION. THE HISTORY OF THE 1934 EXCHANGE ACT BELIES SUCH AN INTENT.

The decision below states: "(T)he district court found that the exchange's power to fix minimum rates existed

by implication." (App. 10a) But the basis for this implication (ostensibly adopted by the court below rests on a completely erroneous approach which nullifies the Exchange Act's standard of reasonable rates.

In support of the District Court's implication of Congressional intent to authorize exchanges to fix uniform rates, its opinion noted that Congress was well aware of defendant's commission law when it enacted the Exchange Act but did nothing to outlaw the long established practice (App. 5a). The fact remains that between passage of the Sherman Act in 1890 and the Exchange Act in 1934, defendants' rate fixing agreement (of services)[24] was unquestionably a violation of the Sherman Act. Long before 1934 opinions of this Court conclusively established the interstate character of brokerage businesses employing telegraph transmission lines.[25] By 1927 price fixing was a *per se* unreasonable restraint of trade. *United States* v. *Trenton Potteries,* 273 U.S. 392, 397-398.

The proper approach then is to determine whether Congress intended to grant Exchange members an ex-

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[24] *United States* v. *Trans-Missouri Freight Ass'n.,* 166 U.S. 290, 312 (1897); *United States* v. *Joint Traffic Ass'n.,* 171 U.S. 505 (1898); *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427 (1932); *Indiana Farmers Guide Pub. Co.* v. *Prairie Farmer Pub. Co.,* 293 U.S. 268 (1934); Cf. *United States* v. *Real Estate Boards,* 339 U.S. 485, 492 (1950).

[25] *Western Union Tel. Co.* v. *Foster,* 247 U.S. 105, 113-114 (1918); *Western Union Tel. Co.* v. *Speight,* 254 U.S. 17, 18 (1920); *Bedford Art Stone Co.* v. *Journeyman Stone Cutters Ass'n.,* 274 U.S. 37, 49. As early as 1918 the interstate character of grain brokerage operations was not an issue. *Board of Trade of the City of Chicago* v. *United States,* 246 U.S. 231 (1918).

emption from the antitrust laws. As S.E.C. Chairman Cohen has noted:

> "In the extensive legislative history which led up to the enactment of the Securities Exchange Act, we find no reference to the application of the antitrust laws." (Supp. Aff. Ex. 29)

Thus, although Congress was aware of the state of the antitrust laws, applicability to all rate fixing conspiracies when it debated adoption of the Exchange Act, the debates reveal no consideration of antitrust issues. If Congress intended to grant an immunity or to inaugurate a scheme providing for exchanges to legislate their own immunity or for the S.E.C. to grant such immunity, Congress would have at the very least debated the point. "The kind of conduct proscribed by the Sherman Act is simply not such that Congressional silence may be interpreted as congressional approval." *Pan American World Airways* v. *United States,* 371 U.S. 296 (1962), dissent, Mr. Justice Brennan, p. 324. *United States* v. *Trans-Missouri Freight Ass'n.,* 166 U.S. 290, 316 (1897). The Exchange Act not only fails to provide any express antitrust immunity to a rate-fixing agreement, but it expressly preserves all pre-existing rights and remedies. Section 28(a); 15 U.S.C. §78bb(a). Congress thus chose to preserve pre-existing antitrust rights and remedies, not to extinguish them. Nerenberg, *Applicability of the Antitrust Laws,* 16 W. Res. L. Rev. Vol. 16, p. 132, Ftn. 9 (1964).

Congress surely knew that uniform rates would eliminate rate competition. Neither the 1934 Act nor the debates reveal any such economic or other policy to be served via a restriction of competition. Congress could hardly have intended to restrict competition unless such

restriction served some overriding national policy. On the contrary, S.E.C. Chairman Cohen has noted that "It was not the purpose of the Exchange Act, unlike certain other regulatory statutes, to limit or restrict competition in the securities industry." (Supp. Aff. Ex. 23, 111 Cong. Rec. 18309, 18312) Chairman Cohen also stated that Congress intended to rely on competition as the best means of protecting the public. (Supp. Aff. Ex. 29). The district court's implication of Congressional intent to allow Exchange members to eliminate rate competition via uniform rates is contradicted by the absence of any purpose or policy of the Exchange Act to limit such competition.

A more direct clue to Congressional intent is to be found in the original bill (Section 18c) dealing with commission rates. This bill conferred direct regulatory authority in the (Federal Trade) Commission to "fix or prescribe the method of fixing *uniform* rates of commission." (emphasis added) H.R. 7852 and S. 2693, *Hearings on Stock Exchange Practices Before the Senate Committee on Banking and Currency,* 73rd Cong. 1st and 2nd Sess. p. 6432. The bill that passed, the present §19 (b); 15 U.S.C. §78s (b); deleted the word *uniform* and substituted "reasonable rates" as the rate standard. Other changes were made giving exchanges the right (duty?) to initiate and adopt reasonable rates subject to S.E.C. oversight. Between the first bill's §18(c) and the present § 19 (b), there were no debates reported regarding the change. The opinions of the courts below make no mention of this bit of legislative change. If Congress intended the exchanges to have the power to adopt uniform rates, why did it instead substitute therefore a standard of reasonable rates?

If there are doubts about whether uniform rates or competitive rates protect investors, the Maloney Amendment to the Exchange Act, passed in 1938, 15 U.S.C. §78o-3 has clarified Congressional intent. The Maloney Amendment expressly prohibits a registered association (of over-the-counter dealers) from fixing minimum rates of commission, "to provide safeguards against unreasonable profits or unreasonable rates." 15 U.S.C. §78o-3 (b)(8). Congress can hardly have intended the self-regulatory power of Exchange-members to adopt reasonable rates to carry a power to adopt minimum rates, in view of the positive Congressional recognition of the fact, albeit four years after passage of the Exchange Act, that only competitive rates provide investors with a safeguard against unreasonable rates.

IV.

THE APPROACH TAKEN BELOW IGNORED ESSENTIAL ECONOMIC DISTINCTIONS BETWEEN FIXED RATES APPLIED TO REGULATED UTILITY-TYPE BUSINESSES AND BROKERAGE OPERATIONS WHICH ARE OF IMPORTANCE IN THE REGULATORY FIELD.

Although not discussed in the decision below, the District Court's opinion construed the Exchange's power to fix reasonable rates of commission under Section 19(b) as "plain Congressional intent" authorizing the fixing of minimum rates of commission (App. 7a). In support of this "plain Congressional intent" the District Court relied upon an analogy whose faultiness refutes the very intent supposedly so "plain". The District Court stated "The requirement of 'reasonable' rates must accordingly be read in the sense employed in other statutes, where the charges of public utilities are directed to be regulated and fixed at 'reasonable rates'." Illustrating the point,

the District Court cited sections in the Communications Act of 1934, the Interstate Commerce Act and the Federal Aviation Act. (App. 7a).[26]

In citing "reasonable rates" administered by these other agencies, the District Court fashioned the contradiction of its own "approach"; for it failed to make essential distinctions between utility-type operations characterized by a high fixed asset base and a common cost and profit experience, and brokerage operations characterized by a labor base and a diversity of cost and profit experience. A reasonable rate applied to utility-type businesses produces a profit which can be geared to the asset base as a rate of return, all of which has intrinsic economic rationality and validity. Moreover, among competing utility-type businesses there is a similarity of cost and profit experience so that a fixed rate produces a similarity of profits within a narrow range. But the brokerage operation involves a labor base rather than an asset base; a reasonable rate necessarily embraces a reasonable return on labor.

The consummate economic invalidity of uniform rates being reasonable rates lies in the enormous diversity of profits among NYSE member firms, although they all charge fixed rates. A tally of the 177 largest NYSE firms included in NYSE surveys between 1961-1964 reveals that

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[26] The regulatory schemes alleged are very much different from the Exchange Act scheme, with respect to special economic and competitive policies incorporated therein, the pervasiveness of agency rate review and express remedies provided for rate overcharges. The Communications Act, 47 U.S.C. §205 authorizes the Commission to fix reasonable charges, maximum or minimum or maximum and minimum charges. A similar authority is given under the Interstate Commerce Act, 49 U.S.C. §316 (e) and under the Federal Aviation Act, 49 U.S.C. §1482.

seven had profits exceeding 30% (of gross commission income), fourteen had profits between 20-30%, thirty-nine had profits between 19-20%, twenty-seven had profits under 10%, and forty experienced losses. (Counteraff. 46b). Each brokerage house is a separate economic entity with its own cost and profit experience. On no basis in logic, economics or law can it be argued that fixed rates are reasonable when they yield profits of over 40% to some brokers, losses exceeding 5% to others and an infinite number of yields in between. The effect of minimum rates rewards "efficient" brokers with unconscionable profits while subsidizing inefficient, incompetent brokers. It is apparent, then, that the fixed rate concept applied to brokerage operations is merely an artificial pricing mechanism which has no economic relationship to any common denominator of reasonable rates. Thus it is that neither the NYSE nor the S.E.C. has ever been able to articulate a definition of reasonable rates or to identify a particular percentage of profits, or range of percentages, or any other quantitative standard as a measure of fair return or of the reasonableness of a particular rate schedule. (Special Study, Part 2, page 337; Counteraff. 40).

The "approach" thus adopted by the District Court, and approved by the court below, in affirming Congressional intent to allowing exchanges to adopt minimum rates as reasonable rates is completely disaffirmed by an analysis of the economics of brokerage operations, an analysis the District Court failed to make from facts in the record. If uniform rates produce no coherent uniformity of profits, but result instead in unreasonable and unconscionable profits, on what basis can it be said that such rates are reasonable? Congress could not have intended exchanges to have the power to adopt rates and rate structure inherently unreasonable and in direct contradiction to its own standard that they be reasonable.

V.

PETITIONERS HAVE NO EFFECTIVE REMEDY EXCEPT UNDER THE ANTITRUST LAWS.

An anomaly of the 1934 Act is that investors must turn to the antitrust laws for a remedy to fulfill Exchange Act purposes to protect investors against unreasonable rates of commission. The 1934 Act contains neither an express nor an implied remedy allowing investors to recover damages sustained as a result of unreasonable rates and rate structure. Cf. *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1963). Nor does the Act confer power in the S.E.C. to order damages refunds or reparations, past, present or future. Unless investors are protected with a damages remedy under the antitrust laws, the defendants are free to retain the multi-million dollar benefits flowing from commission law and its interlocking assortment of unreasonable restraints of trade. That Congress intended the 1934 Act scheme to confer such a total dispensation (via a complete immunity to damages) suggests a solicitude for NYSE brokers not corroborated in the debates leading up to passage of the Act. Yet that is the effect of the decision below. If it is correct, investors would be better off, rate-wise, if the 1934 Act had never been passed. For in such case the antitrust laws would surely apply to respondents' commission law, both to restrain it and to allow damages to persons injured by it. Congress can hardly be supposed to have intended, in passing the 1934 Act, to extinguish the only remedy available to investors to collect their damages, and to extinguish the only effective check against otherwise unchecked Exchange-member economic self-interest. Whatever the S.E.C.'s rate regulatory powers encompass under §19(b), they do not include the power to award damages. Cf.

Keogh v. *Chicago C.W. Ry. Co.*, 260 U.S. 156, 162 (1922); *United States* v. *Morgan*, 307 U.S. 193, 190 (1939). The fact that Congress failed to provide the S.E.C. with pervasive remedial powers to order damage reparations is another aspect of the incomplete and ineffective bond of protection afforded investors under the 1934 Act scheme. Cf. *Atlantic Refining Co.* v. *Public Service Comm'n. of N.Y.*, 360 U.S. 357, 388-389 (1959). The absence of an investor remedy to recover damages under the 1934 Exchange Act scheme (affirmed by the trial court's dismissal of such claims asserted in petitioners' amended complaint) serves to emphasize the need to apply damages sanctions provided by the antitrust laws. Sections 4 and 16 of the Clayton Act; 15 U.S.C. §15 and §26.

The *Silver* case, *supra*, turned in part on Silver not having a remedy of S.E.C. review with respect to an application of Exchange rules resulting in a group boycott against him. In the case at bar the essence of unreasonable rates consists of continuing rate overcharges, and the only remedial check appropriate to repair such injury is damages. Such damages are recoverable only under the antitrust laws.

Under the erroneous approach taken by the courts below, the vehicle of S.E.C. rate review under §19(b) was sufficient to invoke an implied repeal, without even considering the fact that such review did not comprehend remedial powers, especially powers to award damages. Yet these broad remedial powers were identified by this Court as part of the package of ingredients essential to an implied repeal. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351 (1963).

But even apart from the recovery of damages, investors have no remedy under the 1934 Exchange Act to initiate

a rate contest, or to compel the S.E.C. to invoke a rate hearing. By the simple expediency of the S.E.C.'s never having convened a rate hearing there has never been a concluded rate proceeding under the 1934 Exchange Act subject to judicial review.

The Federal Administrative Procedure Act, 5 U.S.C. §1001 *et seq.* does not provide investors with an effective remedy to trade at reasonable rates, and there is no provision under that Act authorizing investors to invoke a remedy of damages for rate overcharges. Section 1003(d) provides that every agency shall accord any interested person the right to petition for the issuance, amendment or repeal of a rule, but there is no duty upon the S.E.C. to act upon such petition. The only other possible action under the Act would be judicial review of the S.E.C.'s agency action in failing to act with respect to conducting a rate proceeding for the purpose of defining, determining and approving reasonable rates, 5 U.S.C. §§ 1001(c); 1001(g); 1009(a). But the entire right to judicial review of the S.E.C.'s failure to act depends upon whether S.E.C. rate action is by law committed to agency discretion, 5 U.S.C. §1009, and under Section 19 (b) of the 1934 Exchange Act it is discretionary with the S.E.C. to request an exchange to adopt rules with respect to reasonable rates of commission. Thus, the Administrative Procedure Act provides no effective remedy to compel the S.E.C. to review and implement reasonable rates.

CONCLUSION

A major component of national wealth consists of stocks traded on the New York Stock Exchange. It is vital to national economic health that the primary market for the trading of those stocks be free from anticompeti-

tive restraints which serve no demonstrable overriding public purpose. Exchange rules prescribing fixed, no-discount rates of commission exact from the institutions represented by petitioners arbitrary, unreasonable and unjustified rates of commission. Only the antitrust laws provide petitioners with meaningful relief to compel the respondents to provide a market that is free, competitive and viable. That the New York Stock Exchange, as the epitome of free-enterprise should itself be the focal point for grand-scale restraints of trade, is an anomaly of our time. This Court is here presented with consideration of the novel question of whether the public shall continue to be arbitrarily subject to respondents commission law without a remedy, or whether the antitrust laws shall be deemed to apply so as to bring respondents into the mainstream of American competitive life. This question commends itself to a determination by this Court.

Respectfully submitted,

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APPENDIX

Memorandum and Order of the United States District Court, February 25, 1966.

Julius J. Hoffman, District Judge. A seeming conflict between the federal antitrust laws and the Securities Exchange Act of 1934 is the source of this controversy. The reconciliation of these apparently opposing policies is a matter of considerable moment to the financial community and to the investing public. The point at issue is the legality of the practices of stock exchanges in fixing minimum rates for the commissions charged by stock exchange members for the purchase and sale of securities on the exchange.

The action was brought by the plaintiff Kaplan and by the plaintiff Dunn (on behalf of her minor children) as a shareholder's derivative suit and at the same time as a representative class action. The plaintiffs thus purport to sue on behalf of, and in the right of, some five corporations which are qualified as investment companies and which are generally known in the financial world as mutual funds, and to sue on behalf of their shareholders as a class. These five mutual funds are joined as nominal defendants, and include One William Street Fund, Inc., The Lehman Corporation, Energy Fund, Inc., The Dominick Fund, Inc., and The Chemical Fund.

The actual defendants ar the New York Stock Exchange (hereafter referred to as the Exchange) and four member firms of that exchange: Lehman Brothers, Goodbody & Co., Dominick & Dominick; Incorporated, and Paine, Webber, Jackson & Curtis. These firms, with others, it is alleged, act as brokers and agents for the

mutual funds in the purchase and sale of stocks listed on the Exchange. Jurisdiction is based upon the antitrust laws, the Securities Exchange Act of 1934, and Sections 1331 and 1337 of the Judicial Code, 28 U.S.C. §§1331, 1337.

The gist of the complaint is the allegation that "Since the year 1792 and up to the present time, an avowed purpose of the defendant (Exchange) has been to set and fix minimum rates of commission to be charged to the public by its members . . . on all brokerage transactions executed on the" Exchange. The constitution of the Exchange thus specifies the exact schedule of minimum commissions to be charged, and pledges all members to obedience. The Exchange polices these rates, and members who violate them are subject to expulsion. Claiming that this arrangement amounts to a combination and conspiracy in restraint of trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq, and that the mutual funds have been damaged thereby in an amount equal to the difference between commission rates which have been charged under the Exchange rules and the rates that would have been available to the mutual funds "by operation of free and open competition had no such contract, combination and conspiracy existed," a demand for judgment for three times those damages is made under the antitrust laws, and, in the same count and upon the same factual allegations, a demand for judgment for the actual damages, unmultipled, is presented on the theory that the alleged misconduct also offends against the Securities Exchange Act of 1934. Still in the same count, the complaint prays for a declaratory judgment holding the rules of the Exchange to be null and void insofar as they prescribe minimum rates of commission, and declaring that all Exchange

members are individually free to determine and set their own rates of commission.

The defendant Exchange and its member firms named as defendants have joined in a motion for summary judgment or, alternatively, to dismiss the complaint for failure to state a claim upon which relief can be granted. The parties have presented voluminous affidavits and exhibits outside the pleadings, and the Court is thereby constrained to treat the motion solely as a motion for summary judgment. Rule 12(c), Fed. R. Civ. Pro.

The opposing briefs disclose no significant disagreements between the opposing sides on the factual basis of the controversy. The affidavits present no genuine issue of material fact to be tried.

The sole question is a matter of law, appropriate for disposition on a motion for summary judgment.

I.

It is undisputed that the Exchange, by vote of its membership, has fixed the rates of commission to be charged by its members, and that those members have agreed to, and do, abide by those rates. Whether the antitrust laws forbid such price-fixing turns upon the interpretation of the Securities Exchange Act of 1934. The parties are agreed on the authoritative source of the principles which control the reconciliation of the Sherman Act and the Securities Exchange Act: the pronouncements of the Supreme Court in Silver v. New York Stock Exchange, 373 U.S. 341 (1963). They part company on the application of those principles to the case at hand.

In Silver, the plaintiff was a broker and dealer in securities but not a member of the Exchange. He made

arrangements with certain Exchange members for direct-wire connections with their offices, to provide him with quotations and other information essential to his business. Under the rules of the Exchange, such direct-wire connections between members and non-members require approval by the Exchange. After tentative and temporary approval, the Exchange denied permission and the connections were severed without giving notice or reasons and without affording plaintiff an opportunity to be heard. His suit for trebles damages under the antitrust laws was sustained by the Supreme Court.

At the outset, the Court concluded that the Exchange was empowered to make rules on the subject of its members' connections with non-members, in order to exclude "bucket shops", "boiler shops", and similar operations. Under the statutory scheme of the Securities Exchange Act of 1934, the various exchanges are obliged to regulate themselves, subject to the surveillance of the SEC, in the interests of stability in the securities market. The exchange, in this process of self-regulation, is obliged to have rules which are "just and adequate to insure fair dealing and to protect investors." Section 6(d), 15 U.S.C. § 78f(d). Registration may be granted to the exchange only if its rules provide "for the expulsion of a member for conduct or proceedings inconsistent with just and equitable principles of trade." Section 6(b). These broad declarations sufficed to validate exchange rules requiring approval of direct-wire connections, the court concluded.

This conclusion led to the collision of policy. "It is plain, to begin with," wrote Mr. Justice Goldberg for the majority, "that removal of the wires by collective action of the Exchange and its members [illegible], had it occurred in a context free from other federal regu-

lations, constitute a per se violation of § 1 of the Sherman Act." 373 U.S., at 347. In this circumstance, the Court unanimously concluded that such conduct could not constitute a violation, in and of itself, of the antitrust laws. In other words, the decision makes it plain that action taken by the Exchange and its members, pursuant to its statutory authority to make rules, is not illegal per se under the Sherman Act.

This basic conclusion served only as a beginning in the Silver case, in view of the remaining questions raised by its facts. It is the final conclusion here. The plaintiffs have cast their lot entirely upon their proposition that the fixing of minimum rates of commission through the collective action of the Exchange is illegal per se under the Sherman Act. If such action is within the authority conferred upon the Exchange by the Act of 1934, however, the direct precedent of the Silver decision stands squarely against them.

Since 1792, when the Exchange was founded with the so-called Buttonwood Tree Agreement, the rules of the Exchange have set minimum rates for the commissions to be charged by its members for buying or selling stocks upon the Exchange. These rules were not called into question after the adoption of the Sherman Act. In the legislative deliberations which preceded the enactment of the Securities Exchange Act of 1934, the existence of such rules was plainly in evidence and duly noted. No action was taken to outlaw the long-established practice. The securities exchange, although not a free and open market, served a public purpose by assuring investors of ready liquidation of their holdings and by affording a ready source of capital for business and industry. Congress thus chose to preserve the benefits of the exchanges, and

to eliminate practices which, by undermining public confidence, might impair those beneficial functions.

The legislative means chosen to achieve these ends left the original regulating power in the exchange itself, and relied upon the SEC as the overseer empowered to protect the public interest. The Exchange was entitled to registration under the Act only if it had adopted rules which were required to be submitted to, and approved by, the SEC.

The SEC is then authorized to "alter or supplement" those rules if, after request, the exchange fails to effect specified changes on its own. Section 19(b) of the Act, 15 U.S.C. § 78s. In that section, Congress enumerated twelve subjects of the exchange's rulemaking power to which the SEC's power to alter or supplement would extend, including the listing of securities, hours of trading, the reporting of transactions, and "similar matters." Listed ninth among these matters for exchange rules is "(9) the fixing of reasonable rates of commission, interest, listing, and other charges." Section 19(b)(9), 15 U.S.C. § 78s.

It may be conceded that the rulemaking power thus conferred is granted in a manner which is somewhat oblique. No simple declarative sentence vests the exchange with power to fix minimum rates. Yet the power is recognized by the plainest implication. The SEC's authority to request changes in rules concerning "the fixing of reasonable rates" necessarily presupposes rules of the Exchange on that subject. If none were adopted by an exchange, the SEC could "supplement" them, after due request.

The plaintiffs seeks to support their per se attack, in the face of this Congressional sanction for rate-fixing,

by emphasizing the requirement that rates of commission must be "reasonable." Prescribed minimum rates, they assert, can never be "reasonable"; only free competitive rates comport with reason. The argument imputes a contradiction which would confound the plain Congressional intent, since it ignores the provision that the "reasonable" rates shall also be "fixed" rates. The requirement of "reasonable" rates must accordingly be read in the sense employed in other statutes, where the charges of public utilities are directed to be regulated and fixed at "reasonable rates." E.g., Communications Act of 1934, 47 U.S.C. § 201; Interstate Commerce Act, 49 U.S.C. §§ 1(4), 1(5), 316; Federal Aviation Act of 1958, 49 U.S.C. § 1374.

Since the plaintiffs have attacked the legality of the Exchange rules and their prescribed rates of commission solely on the ground that fixed rates are illegal, the holding in Silver v. New York Stock Exchange, 373 U.S. 341 (1963) is a complete bar to their claim. Rules adopted by an Exchange under the authority of the Act are not illegal per se.

In the Silver case, the Supreme Court went on, after holding the rules not illegal per se, to consider the remaining questions in the case. Since the power to sever wire connections with non-members could be used to eliminate competition by such a non-member as well as to serve the purposes of securities regulations by excluding unethical or irresponsible dealers, the Court conferred the right upon the non-member to a review of the justification for the termination of the direct-wire connections essential to his business. Finding that nothing in the Securities Exchange Act of 1934 gave the SEC the power to review particular adjudicative decisions of the Exchange in enforcing and applying its rules, and distinguished from review of the legislative action in-

volved in making such rules, the Court concluded that the remedy of review must be found in the judicial branch. Since the misuse of the power to sever wire connections to injure a non-member competitor would not serve the purposes of securities regulations, there remained no policy of securities control to exclude the application of the antitrust laws or to immunize the conduct. Since the Exchange had refused to give notice or reasons or to afford a hearing to determine the justification for its action as an appropriate measure to protect the investing public, the plaintiff prevailed.

This holding adds nothing to the claim of these plaintiffs. The power to deny information to non-members of an exchange is plainly susceptible to misuse as a means to destroy competition. The power to fix rates, unlike the power to exclude, is not a weapon that can be used to injure a particular competitor. The rates, once fixed, apply equally to all Exchange members and to all customers. It is not suggested by the plaintiffs here that the rates are not uniformly applied, that the schedules are discriminatory, or that the power has been used to eliminate competition beyond that elimination inherent in any system of authorized price-fixing.

Moreover, this aspect of the Silver decision is expressly predicted upon the absence of SEC power to review the particular action. "Should review of exchange self-regulations be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." (373 U.S., at 360). This is the "different case", since the SEC exercises a general and continuing power to change, alter, or supplement the rules of the Exchange fixing the rates of commission. Since review is afforded within the system of securities regu-

lation, there is no need to resort to the antitrust laws for a remedy.

The plaintiffs have complained of the rates because they are fixed. If they had complained instead that the rates were too high, they would find no support in the antitrust laws. The remedy for a level of rates that is unreasonably high rests with the SEC. Ratemaking is a matter for which the courts are ill-equipped, and accordingly a matter traditionally committed to an administrative agency. See Board of Trade of Kansas City v. United States, 314 U.S. 534, 546 (1942). The SEC since its establishment has exercised this power of review over Exchange rates of commission, and it has inaugurated a regular system of reporting from Exchange members to furnish the necessary information.

To subject the Exchange to the perils of treble liability, retroactively imposed, upon the variant decisions of different courts in determining the reasonableness of rates would inevitably disrupt the congressional plan designed to bring order to the marketing of securities. To leave the determination of reasonableness to the prospective decisions of the agency which is especially qualified and responsible for the general supervision of the industry will assure the intention of Congress as well as the interests of the public.

Judgment will be entered, accordingly, for the defendants' with costs to be assessed against the plaintiffs.

Opinion of the United States Court of Appeals for the Seventh Circuit. January 4, 1967.

Before SCHNACKENBERG, CASTLE and FAIRCHILD, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.*

Plaintiff Harold Z. Kaplan, and minor plaintiffs Frederick L. Dunn, Daniel B. Dunn, Charlotte F. Dunn and Nancy L. Dunn, by Lila Dunn, their next friend, as shareholders in several named mutual funds, brought a class action derivatively for and on behalf of all shareholders of The Lehman Corporation, a Delaware corporation, and four other mutual funds.[1] An appeal on behalf of said plaintiffs was taken from a summary judgment of the district court in favor of defendants, New York Stock Exchange and four brokerage firms which are member firms in said exchange.[2]

Plaintiffs' amended complaint seeks recovery of treble damages against defendants for allegedly engaging in a coercive conspiracy fixing minimum uniform rates of brokerage commission and adhering to said rates in violation of the Sherman Antitrust Act.[3]

It is the theory of plaintiffs that the Securities and Exchange Act of 1934, 15 U.S.C.A. § 78a, et seq. contains no express grant of immunity from the antitrust laws for such alleged activities and neither does that act impliedly immunize or exempt the "minimum rate fixing activities" of the exchange from the antitrust laws. Plaintiffs rely on the language of § 19(b) of the act, 15 U.S.C.A. § 78s, but it is important to note that subparagraph (b) thereof does authorize the Commission to

> "* * * alter or supplement the rules of such exchange * * * in respect of such matters as * * *

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[1] Lehman Brothers, Goodbody & Co., Dominick & Dominick, Incorporated, and Paine, Webber, Jackson & Curtis.

[3] Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq.

(9) the fixing of reasonable rates of commission, * * *".

The district court found that the exchange's power to fix minimum rates existed by implication.

[1] With the aid of the exhaustive decision of the Supreme Court and Mr. Justice Stewart's dissenting opinion, in Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963), we are now able to determine that, although the "Securities Exchange Act contains no express exemption from the antitrust laws," a "repeal" thereof is to be regarded as implied "if necessary to make the Securities Exchange Act work". We accordingly interpret the district court's action as holding that the antitrust laws are inapplicable to the New York Stock Exchange insofar as its prescribing of minimum commission rates is concerned.

We further hold that in this situation the self-regulatory function of the exchange has been exercised by virtue of § 19(b).

[2] On the facts set forth in the complaint herein, we do not construe the Sherman act and the exchange act as showing a congressional intention to permit the maintenance of an antitrust prosecution of the exchange or its members to be based upon its action relating to rates of commission to be charged by its members. Obviously the fixing of minimum commissions is one method of regulating commission rates.

For the reasons herein stated, the judgment from which plaintiffs appeal is affirmed.

Judgment affirmed.

Order of the United States Court of Appeals for the Seventh Circuit. January 4, 1967.

This cause coming on to be heard on the transcript of record from the United States District for the Northern District of Illinois, Eastern Division, and was argued by counsel.

Upon consideration whereof, it is ordered and adjudged by this Court that said judgment of said District Court in this cause appealed be, and the same is hereby affirmed with costs in accordance with the opinion of this Court filed this day.

STATUTES INVOLVED

Section 1 of the Sherman Anti-Trust Act (15 U.S.C. § 1) reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, pro-

viding for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court."

Section 2 of the Clayton Act (15 U.S.C. § 15) reads as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendants resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 16 of the Clayton Act (15 U.S.C. § 26) reads as follows:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages

for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *."

Section 2 of the Securities Exchange Act of 1934 (15 U.S.C. § 78 b)

"For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonable complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of current interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign

countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities and which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden national credit."

Section 6(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(b))

"(b) No registration shall be granted or remain in force unless the rules of the exchange include pro-

vision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade."

Section 6 (d) of the Securities Exchange Act of 1934 (15 U.S.C. §78f(d))

"(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange."

Section 15A as amended of the Securities Exchange Act of 1934 (15 U.S.C. 78o-3(b)(8))

"(b) An applicant association shall not be registered as a national securities association unless it appears to the Commission that • • •

(8) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments and to perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers; or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges."

Section 19 (b) of the Securities Exchange Act of 1934 (U.S.C. § 78 s(b))

"(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as * * * *

(9) the fixing of reasonable rates of commission, interest, listing, and other charges;"

[redacted]

[redacted]

HAROLD L. KAPLAN, et al.,

Petitioners,

v.

LOUISIANA PROCESSING, et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION
TO PETITION FOR CERTIORARI

[redacted]

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No. 197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HAROLD Z. KAPLAN, et al.,
Petitioners,

vs.

LEHMAN BROTHERS, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTION PRESENTED

The question presented is whether, in view of this Court's decision in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), any reason exists for this Court to review the decision below holding that the rules of the New York Stock Exchange fixing minimum rates of commission to be charged by its members do not violate the Sherman Antitrust Act (15 U.S.C. § 1 *et seq.*) since such rules are authorized by Section 19(b)(9) of the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq.*) and are subject to review and revision by the Securities and Exchange Commission.

STATEMENT OF THE CASE

In this civil action under the Sherman Act petitioners as shareholders sue derivatively on behalf of five investment companies ("the mutual funds") and as a class on behalf of other shareholders. Relief is sought against respondents New York Stock Exchange ("the Exchange")

and four of its member firms which, it is alleged, act with others as brokers for the mutual funds in the purchase and sale of securities listed on the Exchange.

The amended complaint (A. 3-35)[1] charges that the long established practice of the Exchange of adopting rules fixing minimum commission rates for transactions in securities listed on the Exchange constitutes an illegal price-fixing conspiracy and that the mutual funds have been damaged to the extent of the difference between the fixed commission rates charged and the lesser rates which it is asserted would have prevailed in the absence of the Exchange rules. The relief sought is treble damages, a declaratory judgment, and an injunction prohibiting the continuance of commission rate-fixing by the Exchange.

The Exchange and the member firms moved to dismiss and for summary judgment upon the ground that, since the fixing of commission rates by the Exchange is authorized by the provisions of the Securities Exchange Act of 1934 ("the Exchange Act") and is subject to oversight, review and revision by the Securities and Exchange Commission ("the SEC"), rules fixing such rates are immune from attack under the Sherman Act (A. 36-37). The District Court granted summary judgment for the Exchange and member firms (App. 1a-9a; 250 F. Supp. 562), and the judgment was affirmed by the Court of Appeals (App. 10a-11a; 371 F.2d 409).

THE FACTS

Most of the matters in petitioners' Statement of the Case are irrelevant and exceed the permissible limits set by Rule 23(1) of this Court. The only pertinent question

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1. References to (A. . .) are to the appendix filed in the Court of Appeals. References to (App. . .) are to the appendix attached to the petition.

is whether the Exchange may adopt rules fixing minimum commission rates free from antitrust liability, not whether those rates are in fact reasonable. The reasonableness of rates is a matter confided by Congress to the jurisdiction of the SEC and is not subject to collateral attack in an antitrust proceeding. The facts material here, therefore, are few and not subject to dispute.

Since its founding in 1792 the Exchange has adopted and enforced rules prescribing minimum commissions to be charged by members on transactions in securities dealt in on the Exchange (A. 21-23, 38-39). The Exchange Act, enacted in 1934, required that all national securities exchanges register with the SEC and be subject to its regulation. The Exchange applied to the SEC for registration pursuant to Section 6 of the Exchange Act and submitted copies of its Constitution and Rules, including the rules prescribing minimum commission rates then in effect (A. 39, 40). The SEC approved the Exchange's application and found that the Exchange's Constitution and Rules, including those concerning minimum commissions, "are just and adequate to insure fair dealing and to protect investors" (A. 53, 54).

Thereafter, the Exchange's minimum commission rates were revised five times—in 1938, 1942, 1947, 1953, and 1958 (partially revised in 1959). Each proposed change was recommended on the basis of a factual study and report of a Special Committee of the Exchange and was submitted to the SEC pursuant to Section 6(a)(4) of the Exchange Act for review under Section 19(b) of that Act. After such review the SEC in some instances did not require modification of the proposed changes. In other instances the SEC requested modifications in the proposed changes which were then adopted by the Exchange (A. 40-44). The commission rates established in 1958, and modified in 1959 in conformity with the request of the SEC, are presently in effect (A. 44).

REASONS FOR DENYING CERTIORARI

In *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), this Court settled the question of the scope of the antitrust exemption accorded to a national securities exchange, registered with the SEC under the Exchange Act, with respect to actions taken by such an exchange in order to carry out its self-regulatory duty under the Exchange Act. The principles there expounded are controlling here. Consequently, this is not a case where this Court is called upon to decide "an important question of federal law which has not been, but should be, settled by this court." Furthermore, since the judgment of the Court of Appeals properly applied the rationale of *Silver*, this is not an instance where an appellate court has "decided a federal question in a way in conflict with applicable decisions of this court." (See Rule 19 of this Court).

I.

THE COURTS BELOW CORRECTLY APPLIED THE PRINCIPLES ENUNCIATED IN THE *SILVER* CASE.

The District Court and the Court of Appeals rested their determinations that the antitrust laws are inapplicable to the Exchange's rules fixing minimum commission rates on the landmark decision in *Silver*, where this Court considered for the first time the applicability of the Sherman Act to the activities of the Exchange carried on in the exercise of its duty of self-regulation under the Exchange Act. In spelling out in *Silver* the nature and extent of the Exchange's antitrust exemption, this Court was not only aware of the principles of law relating to "implied repeals" expounded in the cases cited by petitioners (petition pp. 28-31) but applied those very principles in defining the interrelationship between the Exchange Act and the antitrust laws.

In *Silver* this Court recognized that the Exchange Act established a unique system of self-regulation which placed upon the nation's registered exchanges the initial duty to promulgate rules governing their own affairs and committed to the SEC as guardian of the public interest a power of oversight and revision of those rules. The Court said that the "general dimensions" of the exchanges' "federally mandated duty of self-policing" were set forth in Section 19(b) of the Exchange Act which gave the SEC power to alter or supplement exchange rules respecting a number of specific activities of exchanges and their members (373 U.S. 352, 353). The Court pointed out that although the Exchange Act contains no express exemption from the antitrust laws and its regulatory scheme is not sufficiently pervasive to create total exemption as to all exchange activities, nevertheless repeal of the antitrust laws is to be regarded as implied where a particular instance of exchange self-regulation falls within the scope and purposes of the Exchange Act and is subject to SEC power of review and revision (373 U.S. at 357, 360-61).

The Court also recognized that to subject self-regulatory activities of the Exchange to antitrust review in areas where the SEC has supervisory jurisdiction could involve problems of "conflict or coextensiveness of coverage with the [SEC's] regulatory power" (373 U.S. at 358). It was the absence of SEC power to review the specific action of the Exchange involved in the *Silver* case (withdrawal of certain non-member private wire connections) which led this Court to conclude that in the peculiar circumstances there presented application of the antitrust laws was not incompatible with the provisions of the Exchange Act. At the same time the Court emphasized that:

> "Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws,

a different case as to antitrust exemption would be presented." (373 U.S. at 360.)

Dismissal of the complaint by the District Court and affirmance by the Court of Appeals reflect the only permissible result under a proper application of both the Exchange Act and *Silver*.

Section 19(b)(9) of the Act provides:

> "The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested . . . by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as . . . (9) *the fixing of reasonable rates of commission, interest, listing, and other charges; . . .*" (Emphasis added).

Although Section 19(b)(9) is framed in terms of a grant of review power to the SEC rather than a direct grant of rule-making authority to exchanges, the provision authorizing the SEC to "alter or supplement the rules of such exchange" with respect to "the fixing of reasonable rates of commission" obviously contemplates action by the SEC with respect to rates already set by the Exchange. This is also apparent from the fact that under Section 19(b)(9) the SEC, as a prerequisite to any revision in existing rates, must first request the Exchange to "effect on *its own behalf*" any suggested "changes in *its* rules and practices." (Emphasis added).

The SEC fully supported this interpretation of Section 19(b)(9) in its brief amicus curiae urging the Court of

Appeals to affirm the District Court's judgment. The SEC's position was consistent with the "Report of Special Study of the Securities Markets of the Securities and Exchange Commission", 88th Cong., 1st Sess., House Document No. 95 (1963) (hereinafter cited as "SS"), where the respective roles of the Exchange and the SEC were explained as follows:

> ". . . the statutory scheme . . . vests rate making initiative in the exchanges and a residual, albeit continuing, responsibility of oversight in the Commission." (SS Pt. 2, p. 329).

Because the SEC is vested by Section 19(b)(9) with specific authority to review Exchange rates for reasonableness and to exercise "a general and continuing power to change, alter or supplement rules of the Exchange fixing rates of commission", the District Court properly held, and the Court of Appeals correctly affirmed, that this is the "different case" referred to by this Court in *Silver* (App. 8a; 250 F. Supp. 562, 566). Since, as the District Court said, "review is afforded within the system of securities regulation there is no need to resort to the antitrust laws for a remedy" application of the Sherman Act to Exchange commission rate-fixing would "inevitably disrupt the congressional plan" (App. 8a, 9a; 250 F. Supp. 566).

II.

PETITIONERS' ATTEMPTS TO CIRCUMVENT THE PRINCIPLES OF THE *SILVER* CASE DO NOT WARRANT CERTIORARI.

The reasons for granting the writ set forth in the petition are wholly unfounded and do not warrant consideration.

A.

The Claim That Existing Rates Are Unreasonable.

The essential weakness in petitioners' position is that it is not directed to the sole issue of whether the Exchange's fixing of commission rates is barred by the antitrust laws, but is an attack upon the economic reasonableness of the commission rate structure presently in effect, a matter which Congress has entrusted to the SEC. Petitioners assert, for example, that the minimum commission rates adopted by the Exchange are inherently unreasonable because they do not provide for graduated or volume discounts and include "costs of service other than the basic brokerage function" (petition p. 22). This argument is an invitation for an antitrust court to inject itself into the economic complexities of commission rate-fixing and to substitute its judgment for that of the SEC. Congress has seen fit to repose in the SEC the responsibility of determining whether rates adopted by the Exchange are reasonable or require change in order to effectuate and carry out the purposes of the Exchange Act. Whether the rate structure should provide for volume discounts, what the level of rates should be, and all other aspects of rate review are confided by the Act to the SEC for determination.

In comparable situations the impropriety of courts engaging in the delicate complexities of rate-fixing in regulated industries has been recognized by this Court. *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 548 (1942); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 669-70 (1963). As the District Court in this case noted:

> "To subject the Exchange to the perils of treble liability, retroactively imposed, upon the variant decisions of different courts in determining the reason-

ableness of rates would inevitably disrupt the congressional plan designed to bring order to the marketing of securities. To leave the determination of reasonableness to the prospective decisions of the agency which is especially qualified and responsible for the general supervision of the industry will assure the intention of Congress as well as the interests of the public" (App. 9a; 250 F. Supp. at 566).

B.

The Standard of "Reasonable Rates."

Petitioners also complain that the standard of "reasonable rates" contained in Section 19(b)(9) of the Exchange Act has never been "defined" by the SEC; that the standard is "meaningless" and a "nullity"; and that it purportedly results in a "denial" of the protection of investors sought to be accomplished by the Exchange Act (petition pp. 17-20).

The standard of "reasonableness" of commission rates must be judged in light of Section 6(d) of the Exchange Act providing that an exchange may be registered under the Act by the SEC only if its rules "are just and adequate to insure fair dealing and to protect investors", and in the context of Section 19(b) authorizing the SEC to require changes in exchange rules wherever "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded upon such exchange or to insure fair administration of such exchange." Thus the standard of "reasonableness" does not stand alone as a "bare bones" concept unrelated to the purposes of the Act but is fleshed out by other guidelines specified in the Act. As stated in *American Power Co.* v. *S.E.C.*, 329 U.S. 90, 104 (1946), ". . . these standards need not be tested in isolation. They derive much meaningful content from the

purpose of the Act, its factual background and the statutory context in which they appear."

Moreover, the standard of "reasonableness" has been utilized by Congress in numerous regulatory statutes as a yardstick for rate-fixing and agency review and has never been considered so bereft of substance or content as to leave the supervisory agency without adequate guidance. See, e.g., Interstate Commerce Act, 49 U.S.C. §§ 1(4), (5) and 316; Federal Aviation Act of 1958, 49 U.S.C. § 1374; Communications Act of 1934, 47 U.S.C. § 201; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944).

C.

The Change from "Uniform" to "Reasonable" Rates.

Petitioners further suggest that minimum rates cannot be regarded as "reasonable" within the meaning of the Exchange Act since during the congressional deliberations the word "reasonable" was substituted for the word "uniform" as the standard to be applied by the SEC in determining whether the rates fixed by an exchange are proper (petition p. 41). Petitioners point to nothing in the legislative history which supports these suppositions. The legislative evidence is overwhelming that Congress was well aware that the Exchange had been fixing minimum commission rates since 1792, and there is not the slightest hint that it intended to outlaw this practice. See *Hearings Before Senate Committee on Banking and Currency on Stock Exchange Practices,* 73d Cong., 2d Sess., Pt. 16, pp. 6075, 6080 (1934); *Hearings Before House Committee on Interstate and Foreign Commerce,* H.R. 7852 and H.R. 8720, 73d Cong.,

2d Sess., pp. 302-21, 423-24; *Hearings on S. Res. 84 Before Senate Committee on Banking and Currency,* 72d Cong., 2d Sess., App. to Pts. 1-3, Ex. 24 (1932); 78 *Cong. Rec.* 8087, 8092, 8490, 8493-94 (1934). On the contrary, what legislative history there is in connection with the word change in question indicates that it was designed to make clear that the SEC was to have power to order changes in the level and structure of rates and not simply to insure that rates would be uniform. See, e.g., *Stock Exchange Practices, Hearings Before the Senate Committee on Banking and Currency,* 73 Cong., 2d Sess., Pt. 16, p. 7705 (1934).

D.

The Maloney Act Amendment.

Petitioners attempt to support their position by citing the 1938 Maloney Act Amendment to the Exchange Act, providing for regulation of the over-the-counter market and prohibiting any associations of over-the-counter dealers from imposing "any schedules or fixed minimum rates of commission" (15 USC § 78o-3(b)(7)). But the very fact that commission rate-fixing was specifically prohibited in the over-the-counter market and not in the registered exchange market demonstrates that Congress intended to treat the two markets quite differently.

The lesser degree of self-regulation accorded by the Maloney Act to associations of over-the-counter dealers merely reflects Congressional recognition of the fact that in over-the-counter markets there is no central market place, such as the Exchange, with authority to regulate trading, commissions or mark-ups. The intent of Congress was to leave this situation unchanged, just as it left un-

changed the long-standing practice of the exchanges to adopt rules fixing minimum rates of commission.

E.

The Alleged Lack of "Pervasive" SEC Regulation.

Petitioners argue that lack of "pervasiveness" in the SEC's regulatory authority affects the antitrust validity of exchange action taken pursuant to Section 19(b) (petition pp. 34-38). But the fact is that the broad powers granted to the SEC in the area of commission rate fixing could hardly be more pervasive. Section 19(b)(9) authorizes the SEC to order changes in exchange rules fixing commission rates whenever such changes are found to be "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange." Furthermore, this power extends to both the level and structure of commission rates. (SS Pt. 2, p. 294).

As for petitioners' suggestion that the SEC shares their view that its powers are unduly limited by Section 19(b) (petition p. 38), it is sufficient to note that the SEC in its brief amicus curiae to the Court of Appeals in this case emphasized not only that it had all the power necessary to regulate commission rates but also that it would be obstructed in the discharge of its duty if an antitrust court should undertake the task of determining whether commission rates are reasonable.

Nor is there merit in petitioners' alternative argument that, even if the SEC has authority to regulate commission rates, it has failed to exercise that authority. In fact, the

SEC has reviewed each of the five commission rate changes adopted by the Exchange since 1934. Furthermore, since publication of the Special Study Report in 1963 the SEC has had under active and still current consideration the varied and complex problems involved in the commission rate level and structure. These and many other developments in connection with the SEC's regulation of securities markets since publication of the Special Study Report have been reported by the SEC to the House Committee on Interstate and Foreign Commerce. See, 112 *Cong. Rec.* 17061-17063 (August 2, 1966).

F.

The Claimed Lack of a Remedy Except under the Antitrust Laws.

Finally, there is no anomaly, as petitioners urge (petition pp. 45-46), in the failure of the Exchange Act to permit investors to recover damages in the event the Exchange should fix, and the SEC should accept, unreasonable rates of commission. In *Montana-Dakota Co.* v. *Pub. Serv. Co.*, 341 U.S. 246 (1951), suit was brought for damages claimed to have resulted from the charging by a utility of unreasonably high rates contrary to the provisions of the Federal Power Act which required that such rates be "just and reasonable." Plaintiff contended that the statutory requirement of reasonable rates created a legal right to rates deemed reasonable by a court although different from those accepted by the Federal Power Commission. This Court rejected such a contention, acknowledging that its decision left plaintiff without a damage remedy. This Court said:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum

> its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms" (341 U.S. at 251).

See also, *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464 (1959).

This does not mean, as petitioners contend, that they are totally without a remedy in the event they believe that the rates of commission fixed by the Exchange do not accord with the prescribed statutory standard of reasonableness. The Administrative Procedure Act[2] permits any person aggrieved by any aspect of the Exchange's commission rate structure or level to request the SEC to take action. Judicial review of the SEC's action or inaction in this regard is provided for by Section 10 of the Act (See, 5 U.S.C. §§ 1001(g), 1009).

CONCLUSION

The gist of petitioners' case is that the Exchange violated the Sherman Act by complying with the commission rate fixing provisions of the Exchange Act. The rationale of

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2. See §§ 4(d) and 10(a) of the Administrative Procedure Act, 5 U.S.C. §§ 1003(d) and 1009(a).

Silver precludes such a contention. The Petition raises no issues meriting review by this Court and should be denied.

July 24, 1967.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 197

HAROLD Z. KAPLAN, Shareholder in, suing derivatively for and on behalf of all shareholders for the benefit of: ONE WILLIAM STREET FUND, INC., a Maryland corporation, ENERGY FUND INC., a Delaware corporation, THE DOMINICK FUND, INC., a Delaware corporation, CHEMICAL FUND, INC., a Delaware corporation; and HAROLD Z. KAPLAN and FREDERICK L. DUNN, DANIEL B. DUNN, CHARLOTTE F. DUNN and NANCY L. DUNN, Minors, by next friend and parent, LILIA DUNN, Shareholders in, suing derivatively for and on behalf of all shareholders for the benefit of: THE LEHMAN CORPORATION, a Delaware corporation,

Petitioners,

vs.

LEHMAN BROTHERS, a partnership; GOODBODY & CO., a partnership; DOMINICK & DOMINICK, INCORPORATED, a corporation; UNKNOWN MEMBER ORGANIZATIONS OF THE NEW YORK STOCK EXCHANGE TRANSACTING BROKERAGE BUSINESS FOR CHEMICAL FUND, INC. and other Defendant-Funds; PAINE, WEBBER, JACKSON & CURTIS, a PARTNERSHIP; THE NEW YORK STOCK EXCHANGE, ONE WILLIAM STREET FUND, INC., a Maryland corporation; ENERGY FUND INC., a Delaware corporation; THE DOMINICK FUND, INC., a Delaware corporation; CHEMICAL FUND, INC., a Delaware corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

I.

PRELIMINARY STATEMENT

The able and vigorous efforts made by Respondents to defend the District Court's opinion[1] have in reality only emphasized the necessity for this Court's scrutiny of the issues presented by granting the pending petition. The Respondents' brief significantly omits any reference or analysis of three controlling decisions cited by Petitioners, (one of which was decided by the same Court after its decision in *Silver* v. *New York Stock Exchange,* 373 U.S. 341).[2] All three cases deal with the crucial issue of implied immunities under the antitrust laws. It is the judgment of the Respondents that this Court's opinion in *Silver* v. *New York Stock Exchange, supra,* once and for all resolved any questions which might arise with regard to the effect of antitrust law, policy and enforcement upon the self-regulatory rules of the Exchange. Petitioners submit that as a consequence of this approach the Respondents have failed to meet or to answer the central thrust of the Petition for Certiorari.

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[1] The Circuit Court's opinion in the instant case is summary to the point of openly inviting this Court's immediate attention to the vital issues presented.

[2] *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963); *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963); and *California* v. *Federal Power Comm.,* 369 U.S. 482 (1962). It is interesting to note that in rendering its opinion the District Court cited only two cases, *Silver, supra* and *Board of Trade of Kansas City* v. *United States,* 314 U.S. 534 (1942). The Court of Appeals saw no necessity to look any further than *Silver, supra.*

II.

THE RESPONDENTS HAVE FAILED TO DEMONSTRATE THAT THE SILVER CASE IS DISPOSITIVE OF THE ISSUES PRESENTED BY THE PETITION

The Respondents' essential contention is that the District Court and the Court of Appeals properly rested their determinations on *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963) "which settled the question of the scope of the antitrust exemption accorded to a national securities exchange." (Br. in Opp., p. 5). Respondents then set forth their interpretation of *Silver:*

> The Court pointed out that although the Exchange Act contains no express exemption from the antitrust laws and its regulatory scheme is not sufficiently pervasive to create total exemption as to all exchange activities, nevertheless repeal of the antitrust laws *is* to be regarded as implied where a particular instance of exchange self-regulation falls within the scope and purposes of the Exchange Act and is subject to SEC power of review and revision (373 U.S. at 357, 360-61). (Br. in Opp., p. 5.) (Emphasis supplied.)

This Court did not state that antitrust immunity is to be implied, rather the Court stated that:

> . . . particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act *may* be regarded as justified in answer to the assertion of an antitrust claim. *Silver* v. *New York Stock Exchange, supra,* at page 361. (Emphasis supplied.)

Further, the opinion set forth the foregoing observation only after carefully emphasizing the necessity for watchful judicial application of established antitrust principles on an *ad hoc* basis. Then the Court specifically warned of the danger of any implied re-

peals of the Sherman Act and further emphasized the importance of a meaningful consideration and application of the doctrine of pervasiveness. *Silver, supra,* at page 373.

Respondents virtually ignore these warnings as being unnecessary. In light of Respondents' failure to even comment on *United States* v. *Philadelphia National Bank,* 374 U. S. 321 (1963) in which this Court expanded and emphasized the warnings in question, Respondents' argument on "pervasiveness" can only be viewed as conclusions unsupported by any careful or detailed analysis. (Br. in Opp., pp. 12-13.)

Admittedly, Congress has not provided Section 19(b)(9) with any express statutory immunization from the antitrust laws. In the *Philadelphia Bank* case, *supra,* there is an expanded restatement of the admonishments set forth in the *Silver* case which must be observed in situations where the regulatory statute under consideration contains no express immunity.

> Repeals of the antitrust laws by implication from a regulatory statute are *strongly disfavored.* (*United States* v. *Philadelphia National Bank, supra,* at page 351). (Emphasis supplied.)

To emphasize and clarify the importance of this principle, this Court employed as examples two recent cases, *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963), and *California* v. *Federal Power Comm.,* 369 U.S. 482 (1962).[3]

The first case, *Pan American, supra,* was chosen by this Court to illustrate that the C.A.B. had been given

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[3] See also, *United States* v. *First City National Bank of Houston,* — U.S. —, 18 L.ed.2d 151 (1967); *Carnation Company* v. *Pacific Westbound Conference,* 383 U.S. 218 (1966).

broad powers to enforce the *competitive standard clearly delineated* by the Civil Aeronautics Act and to immunize a variety of transactions from the antitrust laws. The statutory authority was found to be sufficiently *pervasive* to prevent the application of the Sherman Act to facts constituting the *precise ingredients* of a case subject to the Board's broad *regulatory* and *remedial* powers.

The second case, *California* v. *Federal Power Comm., supra,* was presented as an example of a case at the opposite end of the spectrum.

> In the California case, on the other hand . . . the FPC's approval of a merger did not confer immunity from § 7 of the Clayton Act, even though . . . the agency had taken the competitive factor into account in passing upon the merger application. *United States* v. *Philadelphia National Bank, supra,* at page 351.

This decision was explicitly based upon a determination by the Court that " 'there is no *pervasive regulatory scheme' including the antitrust laws* that has been entrusted to the Commission." *California* v. *Federal Power Commission, supra,* at p. 485. (Emphasis supplied.)

Similarly, this Court in *Philadelphia National Bank; supra,* at page 351, found that although the Comptroller was required to consider the effect upon competition in passing upon appellees' merger application, the statute granting such power did not set forth any particular weight to be given such a factor. Further, unlike the FPC procedure, the Comptroller was not even required to, and indeed did not, hold a hearing before approving the application, which is a remarkably similar situation to the case at bar.

Just as this Court found that the range and scope of the administrative powers under the Bank Merger Act bear little resemblance to those involved in the *Pan American* case, the instant case provides even less of a similarity.[4]

The Respondents' analysis of the *Silver* case, *supra,* aside from avoiding the matter set forth above, is significantly incomplete. (See Br. in Opp., pp. 5-7). No mention is made of the *threshold question presented* which was clearly recognized in that case. Specifically, is it *possible* to make "an analysis which reconciles the operation of both statutory schemes with one another rather than *holding* one *completely ousted.*" *Silver* v. *New York Stock Exchange, supra,* at page 400. (Emphasis supplied.) Thus, there was a rearticulation of the controlling tenets of *United States* v. *Borden Co.,* 308 U.S. 188, 198 (1939) which holds that if there are "two acts upon the same subject, the rule is to give effect to both if possible."

There was no effort by the Courts below to even attempt a resolution of the threshold question. In this regard, the language employed by the Supreme Court in *Takao Ozawa* v. *United States,* 260 U.S. 178, 194 (1922) is particularly appropriate.

> It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is as-

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[4] Respondents' emphatic reliance upon the *Silver* case as a holding dispositive of issues in the instant case, is aimed at sidestepping the critical issues regarding the lack of pervasiveness of the SEC rate review. There *has never been* an SEC rate hearing and there is no rate record. Thirty-three years have passed and the SEC has never defined "'reasonable rates'' or articulated the criteria applicable to the definition, nor has it calculated or compiled adequate data or even prescribed the accounting principles applicable to such data. This has resulted in the New York Stock Exchange and its members fixing minimum rates completely of their own choosing.

> certained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment . . ."

Once the intent of the legislation under consideration is determined, an implied exemption from the antitrust law, if recognized at all, may be created only to the extent that it is essential in order to achieve the statutory purposes of the regulatory statute.

The primary and overriding purpose of the SEC Act of 1934 was clearly to *protect investors.* In this context, the purpose of Section 19(b)(9) was to protect the investing public from *unreasonably high* brokerage commission rates.[5] Clearly the buying and selling of securities is not a public utility nor a legalized monopoly. There is no reason to give wider scope to the statutory language involved than is required by the obvious Congressional purpose, i.e., to protect investors.

In this regard the Senate Report on the final bill stated:

> The Commission is empowered, after an exchange has failed to adopt rules governing the conduct of business by its members which *the Commission deems necessary for the protection of investors,* to order such adoption. Thus the initiative and responsibility for promulgating regulations per-

[5] The Maloney Act specifically prohibits the fixing of any schedule of prices, the imposing of any schedule or the fixing of minimum rates of commission (15 U.S.C. § 78o-3(b)(8)). Thus, it seems clear that Congress was keenly aware of the relation to the antitrust laws to the securities business and only in the case of the Maloney Amendment did Congress see fit to provide any exemptions (15 U.S.C. § 78o-3(n)). See also *United States* v. *Morgan,* 118 F.Supp. 621, 697 (S.D. N.Y. 1953).

taining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so. [S. Rep. No. 792, 73 Cong., 2d Sess., p. 13 (1934)]. (Emphasis supplied.)[6]

The section in question, 19(b)(9), should have been construed in a manner that would give full force to the Congressional purpose but which would avoid any unnecessary conflict with the Sherman Act. The failure of the Courts below is even more striking in light of the fact that such a construction would have avoided the sweeping repeal of the Sherman Act.

Even in the situation where Congress has granted an express exemption from the antitrust laws,[7] the manner in which the exemption is employed is strictly construed.[8] For example, the Capper-Volstead Act provides an express exemption to agricultural cooperatives from antitrust laws. Nonetheless, this Court in *Maryland and Virginia Milk Prod. Assoc.* v. *United States,* 362 U.S. 458, 468 (1960), asserted that to the extent that activities of the cooperative were outside

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[6] It is to be noted that the SEC in its Amicus Brief before the Court of Appeals chose to quote in full this same segment of the report.

[7] See, for example, the Miller-Tydings Act, 15 U.S.C. 1, the McGuire Act, 15 U.S.C. 45(2)-45(6), the Robinson-Patman Act, 15 U.S.C. 13(a), the Marine Insurance Association Act, 46 U.S.C. 885, the Interstate Commerce Act, 49 U.S.C. 5(11), the Webb-Pomerene Act, 15 U.S.C. 51-2 et seq., and the Capper-Volstead Act, 7 U.S.C. 291-2.

[8] *United States* v. *Borden Co., supra; Georgia* v. *Pennsylvania Railroad Co.;* 324 U.S. 439 (1945); *U.S. Alkali Ass'n.* v. *United States,* 325 U.S. 196 (1945); *United States* v. *E. I. DuPont De Nemours,* 351 U.S. 377, 388-389 (and note 14) (1956).

the legitimate objects of an agricultural cooperative, the Act did not immunize such activities from the operation of the antitrust law.[9]

Similarly, the dissenting opinion in *Silver* recognized that the antitrust laws would have application to Exchange practices if it were shown that the Exchange conspired with outsiders, or if it attempted to use its power to monopolize. Likewise, individual members of the Exchange would be liable if it were shown that they had conspired to use the Exchange's machinery for the purpose of suppressing competition.[10] See dissenting opinion *Silver* v. *New York Stock Exchange, supra,* at 371, footnote 5.

The Court of Appeals found, without any in-depth analysis of the antitrust considerations, that the fixing of minimum rates is *one method of* regulating commission rates (see Petition for Cert. App. 11-a). Certainly, the fixing of maximum rates is *another method* of regulation—one which is in accord with the spirit, intent and purpose of both the SEC Act and the antitrust law. To permit the fixing of maximum rates by

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[9] The District Court below carefully avoided the spectre of predatory practices, *Cf.* allegation Plaintiffs' "Amended Complaint" para. 59, in which it is alleged that the course of conduct engaged in amounted to a fraud and deceit upon the investing public. Compare, Petition at pp. 23-24 wherein the members' practice of "give ups" is discussed.

[10] Compare paragraph 53 of Petitioners' amended complaint filed July 16, 1966 which indicates that the complained of practice eliminates competition and restrains interstate trade and commerce in violation of Section 1 of the Sherman Act. See Petition pp. 11-12 setting forth the manner in which Commission rates are fixed by secret vote of the members. See also, Petition pp. 11-12 which describes the extant monopoly power whereby 7% of the total membership receive 50% of all commissions from public trading.

the Exchange would avoid needless conflict with the antitrust laws. The Petitioners, in suggesting this proposal, are not withdrawing any argument that the fixing of minimum rates is illegal *per se*. It is beyond doubt that the *Silver* case, *supra,* cannot be read to justify the pernicious and excessively stifling anticompetitive effects of minimum price fixing—which are manifestly illegal *per se*. The fixing of maximum rates however is clearly, one instance of the "particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act [which] may be regarded as justified in answer to the assertion of an antitrust claim. *Silver* v. *New York Stock Exchange, supra,* at page 361.

In concluding Petitioners' Reply to Respondents' analysis of the *Silver* decision, *supra,* it must be emphasized that there is not even a remote basis for concluding that this Court was authorizing a jettisoning or ignoring of established antitrust principles. The *Silver* case, on the contrary, carefully read emphasizes the importance of such considerations. The Court recognized that even where the avowed purpose was to protect the investing public from "bucket shop" operations, implied immunity from the antitrust laws *was not granted because of potential anticompetitive dangers involved which were in fundamental conflict with antitrust policy. Silver* v. *New York Stock Exchange, supra,* at page 358.

In light of the obvious misreading of the *Silver* case, *supra,* which necessitates the present controversy, Petitioners respectfully feel constrained to submit to this Court's attention the dissenting opinion of Circuit Judge Waterman in *Silver* v. *New York Stock Ex-*

change, 302 F.2d 714 (1962) which was adopted as the basis of Mr. Justice Clark's concurring opinion in *Silver, supra,* at page 367.[11]

III.

THE PRINCIPLES ARTICULATED IN THE SILVER AND THE PHILADELPHIA NATIONAL BANK CASES CLEARLY WARRANT THE COURT GRANTING CERTIORARI IN THIS CASE.

On pages 7-14 of Respondents' brief in opposition, it is contended that Petitioners have attempted to circumvent the principles of the *Silver* case in order to obtain certiorari. The Respondents present six basic points in an attempt to support this argument. The Petitioners in the succeeding paragraphs will present their arguments in reply to these points.

A. Petitioners' Reply to Respondents' Arguments Concerning the Claim That Existing Rates Are Unreasonable, The Standard of "Reasonable Rates" and The Alleged Lack of "Pervasive" SEC Regulation.

Respondents set forth their view of the significance of Petitioners' contention that the rates challenged are unreasonable on pages 8 and 9 of their brief. In a related vein, Respondents set forth an argument purporting to demonstrate that the SEC regulatory authority is sufficiently pervasive to justify the blanket immunity created by the Courts below, even though

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[11] Circuit Judge Waterman noted as significant, the presence of explicit exemptions in certain parts of the statute and concluded that this should make us hesitate to find a Congressional intention to create implicit exemptions elsewhere in the same legislation. Note also reference to the relevance of Judge Medina's opinion in *United States* v. *Morgan,* 118 F.Supp. 621 at 697 (S.D. N.Y. 1953) in which was set forth the statutory scheme of the Securities Act of 1933 and 1934. See 302 F.2d at 722.

there was no attempt to make a detailed examination into the question of pervasiveness as is required in order to sustain such a determination. (Br. in Opp., pp. 12-13).

One fundamental error permeates these arguments. Such error arises from an attempt by the Respondents to relegate the position of the Petitioners solely to an economic context, when in fact, the Petitioners have presented a unified question which is composed of both antitrust and economic considerations. (See Pet., pp. 28-31). In so doing the Respondents have failed to meet either aspect of the problem adequately.

The record is clear. The Petitioners' basic argument has always been directed toward the fundamental and inherent evil created by the fixing of *minimum* brokerage commissions. The amended complaint filed in this case alleged specifically that the Defendant violated the Sherman Act by fixing minimum commission rates. On appeal, it was attempted to be demonstrated the *per se* nature of minimum rates which were patently inimical to the antitrust law. At no time have the Petitioners waivered in the relief sought, i.e. damages as a consequence of the illegal acts.

From the approach taken by Respondents in developing the three points under consideration, it is apparently felt to be unnecessary to meet the test suggested by this Court in *Silver,* i.e. are the practices challenged " 'inconsistent with just and equitable principles of trade' and rules regulating such dealing are indeed just and adequate to insure fair dealing and to protect investors." Respondents also avoid the guiding principles suggested in *Silver,* i.e., repeal is to be regarded as implied only if necessary to make the Se-

curities Exchange Act work, and even then only to the minimum extent necessary.

Irrespective of these fundamental considerations pointed out above, the Respondents assert that the *Silver* decision is dispositive of the question raised by Petitioners, i.e. the fixing of minimum brokerage commission fees. Yet nowhere in their brief do the Respondents attempt to explain how brokerage rates are fixed or how such rates protect the investing public. Merely because the fixing of minimum brokerage commissions may be argued to be of long standing nature is not a controlling factor to be considered. Compare, for example, *United States* v. *National Ass'n of Real Estate Boards,* 84 F.Supp. 802 (D.C.D.C. 1949) wherein the trial court strained to apply a rule of reason to minimum brokerage commissions which were of an open and long standing nature and which the trial judge felt should be exempt from the *per se* rule of illegality by virtue of the purported salutory purposes and aims of such practices.

The *Real Estate Boards* case, *supra,* presents a striking factual parallel to the case at bar. The Board's code of ethics required that brokers maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates. The practice of fixing such minimum rates was, as noted, open and notorious and of a long standing nature. In addition, as the practice of fixing brokerage fees existed in the District of Columbia, it was in the context of a regulated industry by virtue of a federal statute 50 Stat. 787 dealing with real estate:

> To define, regulate, and license real-estate brokers, business chance brokers, and real-estate salesmen; to create a Real Estate Commission in the District

of Columbia; to protect the public against fraud in real-estate transactions; and for other purposes. (50 Stat. 787).

Nonetheless, the Supreme Court condemned such practice and categorically rejected any erosion of the *per se* test of illegality in the fixing of minimum brokerage fees. *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950).[12]

B. Petitioners' Reply to Respondents' Argument Concerning the Change From "Uniform" to "Reasonable" Rates.

The Respondents attempt to eliminate the significance of the change from "uniform" to "reasonable" rates in the legislation in question. However, Respondents cannot escape the patent fact that "reasonable" rates must be competitive rates to the greatest exent permissible which is consonant with the accomplishment of the purposes of the Securities Exchange Act and still accommodate it to the maximum extent possible with the aims and purposes of the antitrust law. As was spelled out in detail previously, the purpose of the Securities Exchange Act of 1934 was to protect the investing public. See p. 7, *supra.* Certainly it cannot be seriously argued that the purpose of the Securities Exchange Act of 1934 was to protect primarily brokers at the expense of the investing public.

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[12] Compare *United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150 (1940) wherein the Defendant attempted to seek refuge from the impact of a *per se* violation of the antitrust laws, i.e., price-fixing, with an offer of proof covering the background and operation of the National Industrial Recovery Act and Petroleum Code, the condition of the oil industry, the alleged encouragement, cooperation and acquiescence of the Federal Petroleum Administration in the buying program.

C. Petitioners' Reply to Respondents' Argument Concerning The Maloney Act Amendment.

Respondents seek to minimize the significance of the Maloney Act. It is contended that this Act merely reflects the Congressional desire to treat nationally registered securities and over-the-counter securities differently. It is argued that since there is no central exchange Congress was required to enact pervasive regulations. If this analysis is correct then the Congressional enactment must demonstrate what Congress believed to be the desired standard with regard to Exchange regulations in order to create a blanket immunity.

Congress in enacting the Maloney Act wrote into the law a standard of competition ". . . rules of the association are designed . . . to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination . . . to impose any schedule of prices, . . . or fix minimum rates. . . ." [18] Congress in the Maloney Act wrote into the law with regard to over-the-counter exchanges competition in bold and pervasive terms. Certainly the same considerations must apply to nationally registered securities exchanges, for the impact on the investing public is much greater and the potential harm to be created by anything less than competitive market conditions is magnified.

Only after Congress had specifically spelled out in the law the competitive factors and standards to be observed in the conduct of these dealers did it feel safe to grant an express immunity from the antitrust law.

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[18] See footnote 5, *supra*.

D. Petitioners' Reply to Respondents' Argument That There Is a Remedy Outside the Antitrust Laws.

Respondents suggest that Petitioners' proper remedy lies under the Administrative Procedure Act. (Br. in Opp., pp. 13-14). This point is not well taken.

First, it flies in the face of the specific provision of the Securities Exchange Act of 1934 in which Congress expressly provided that the rights and remedies created under the Act were in addition to and not in derogation of all other existing rights. (See 15 U.S.C.A. 78bb)

Second, as pointed out in the Petition on page 47 the Administrative Procedure Act does not provide review for the failure of the administrative agency to perform acts falling within the agency discretion.

Lastly, it appears that the genesis of this suggestion may spring from the majority opinion of the Circuit Court in *Silver, supra.* On page 721, the Circuit Court seems clearly to suggest that one reason why immunity should be granted to the New York Stock Exchange was that Silver had an adequate remedy through a review necessarily implied under the circumstances but admitted "[t]hat the statute was silent on the question . . ." (Note the Circuit Court called attention to the Administrative Procedure Act § 10a, 5 U.S.C. § 1009(a) (1958)). Suffice it to say that this argument must be viewed to have been clearly rejected by the subsequent disposition of the controversy, i.e., the Court remanded the case for retrial under the antitrust laws. Compare, *United States* v. *Borden Co.*, 308 U.S. 188 (1939) in which the price fixing challenged was *discretionary* with the *Secretary of Agriculture*

and *he had not seen fit to exercise his powers.* Nonetheless it was held that an antitrust action could still be maintained.

CONCLUSION

The Courts below have failed to carefully apply the teachings of *Silver, supra,* to the extent that they are applicable to the instant matter. And further, in light of the gross misreading of the *Silver* decision jettisoning the well-established antitrust guidelines articulated by this Court in the *Philadelphia Bank* case, *supra,* it is respectfully submitted that the Petition for Certiorari be granted in order that the rights of the investing public to the protection of the antitrust laws be vindicated. This is, we believe, a case of first impression which vitally affects the thrust and application of the antitrust laws to a field of national importance to the investing public.

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APPENDIX

Section 28 of the Securities Exchange Act of 1934 (15 U.S.C. 78 bb (a))

"(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

Section 15A, as amended, of the Securities Exchange Act of 1934 (15 U.S.C. 78 o-3(n))

If any provision of this section is in conflict with any provision of any law of the United States in force on June 25, 1938, the provision of this section shall prevail."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 197

HAROLD Z. KAPLAN, ET AL., *Petitioners,*

v.

LEHMAN BROTHERS, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR REHEARING

PRELIMINARY STATEMENT

By order dated November 13, 1967 this Court denied petitioners' application for a Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit (371 F. 2d 409) affirming the opinion of the District Court granting respondents' motion for summary judgment (250 F. Supp. 562). The petitioners requested and were granted an extension of time through and including January 8, 1968 within

which to file a petition for rehearing.* The petitioners assert that, as will be demonstrated, there are intervening circumstances of controlling effect and other grounds which although available were not previously presented which this Court should consider. The petitioners hereby apply for rehearing of the order denying their petition for writ of certiorari.

REASONS FOR GRANTING REHEARING

I

Conflict Has Arisen Since the Refusal of This Court to Review the Order of the Seventh Circuit Court of Appeals

On November 29, 1967 only two weeks after this Court's refusal to review the order of the Seventh Circuit Court of Appeals in this case, Manuel F. Cohen, Chairman of the United States Securities and Exchange Commission (SEC) addressed the Investment Bankers Association. In his speech, Chairman Cohen articulated the SEC's interpretation of the lower courts' decisions in the subject case and of this Court's refusal to review the case. Chairman Cohen's speech demonstrates vividly the conflict now existing between the Seventh Circuit Court of Appeals, and the Governmental agency having legislative authority of administering the fixing of reasonable rates of commissions (19(b)(9) of the Securities and Exchange Act of 1934).

Chairman Cohen in his speech stated in part:

> In my view, it would be a mistake to read the decisions, in the *Kaplan* case as meaning that stock ex-

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* Mr. Justice Fortas on November 22, 1967 granted petitioners' request for an extension of time.

> changes are free to fix prices for the services provided by their members without worrying about the national policies reflected in the antitrust laws. . . . The decisions in that case did not deal with the question of whether a particular schedule, or whether certain related practices, were susceptible to attack under the antitrust laws.
>
> It is also essential to any understanding of the matter to recall that the defendants urged, and the courts accepted, the view that an exemption of an application of the *per se* doctrine was available only because of the responsibility and authority of the Securities and Exchange Commission; that is, that such antitrust exemption as is available exists only because of the SEC's power to review all aspects of Commission rates and charges fixed by a stock exchange presumably in a manner which will give adequate recognition to the national policies underlying the antitrust laws . . .
>
> In other words, the disposition of the *Kaplan* case has not detracted from the urgency of this question. It has only made possible a considered and comprehensive review of all aspects of the problem by the stock exchanges and by us, subject to review when appropriate by the courts.

The tenor and timing of Chairman Cohen's address manifest an apparent impatience and frustration with the conduct of the New York Stock Exchange (NYSE), subsequent to this Court's action in refusing to review the matter. In a report published in the *Wall Street Journal* of *November 22, 1967,* it appears that although the NYSE has been grappling with the problem of rate discounts since 1953, it stated that it would be at least 18 months before any formal proposal would be made to its governing board. The report then continued: "An official of the Securities and Exchange Commission expressed surprise that the Big Board has put off a decision on Commissions by 18

months. 'If they say it's going to take that long, what can I say—other than it's a shame,' he remarked."[1]

It is obvious from this recitation of post-decision facts, that the SEC and the Seventh Circuit view the decisions differently, with the NYSE following the Seventh Circuit's view.

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[1] In what appears to be a belated attempt to give lip-service to the dissenting opinion of the Chief Justice in the *Kaplan* case and the Chairman's Speech, the NYSE on January 2, 1968 presented to the SEC so-called "proposals" relating to certain Exchange Practices such as give-ups discounts and other related practices which have been the subject of widespread criticism. At the same time the Exchange issued a press release which received nation wide publicity. For example, the *New York Times* of January 3, 1968: "The proposals, regarded as a basis for negotiation between the exchange and the SEC, reflect the growing impact of institutions such as mutual funds upon the market place." It should be noted that the Exchange package lacked any specifics. For example, the NYSE's first proposal to allow discounts on volume transactions presented no details. Indeed, the proposal gave no reference to the SEC Act's reasonable rate standard or the relevance and application of such a standard to whatever discounts might be adopted. The proposals themselves can hardly be viewed as anything more than a token gesture. The last three points in the package are designed to lure back lost commission business and to beat back the competitive challenge to the NYSE by curtailing brokerage activities in the regional exchanges and in the third market. The present package is in this regard reminiscent of the 1964 NYSE proposals to consider block discounts *coupled with a general increase* of commission rates. Nothing came of this package which was finally withdrawn—demonstrating the all or nothing aspect of a package approach. Can the NYSE hope to escape the well established prohibitions of the Antitrust laws and this Nation's commitment to a policy of free competition by the mere submission of generalized proposals without either supporting data or implementing details? Certainly these proposals are nowhere near the careful and studied approach which problems of this magnitude required, as stated by the Chief Justice a blunderbuss approach to problems in this field "falls far short of the close analysis and delicate weighing process mandated by this Court in *Silver*." *Kaplan* v. *Lehman Brothers, supra.*

The Seventh Circuit stated "We accordingly interpret the district court's action as holding that the antitrust laws are inapplicable to the New York Stock Exchange insofar as its prescribing of minimum Commission rates is concerned." *Kaplan* v. *Lehman Brothers,* 371 F. 2d 409, 411. The decision of that court can therefore only be viewed as completely immunizing from the antitrust laws a practice, time and time again, determined to be *per se* illegal.[2] *United States* v. *National Assn. of Real Estate Boards,* 339 U.S. 485 (1950); *United States* v. *Sacony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.,* 273 U.S. 392 (1927). *Compare Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). The decision of the Court of Appeals, as it stands now, would make it possible for the New York Stock Exchange to fix rates which are unfair and unreasonable.[3]

Referring to Chairman Cohen's speech again, it should be emphasized that the SEC does not construe the decisions cited in *Kaplan* or *Kaplan* itself as a grant of blanket immunity. Compare *Silver* v. *New York Stock Exchange, supra.* To the contrary "The *Kaplan* case dealt only with the broad question of the right of the New York Stock Exchange to fix and to

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[2] The Exchange Act does not provide for antitrust immunity and legislative history intimates no such exemption. Certainly when Congress has desired to grant antitrust immunity in similar situations, it has manifested that intent. See Clayton Act § 6, 15 U.S.C. § 17, Webb-Pomerene Act; 15 U.S.C. § 62; Walter-McCarran Act, 15 U.S.C. § 1012.

[3] See 19 W. Res. L. Rev. 167 (1967); Accord, Nerenberg, Applicability of the Antitrust Laws to the Securities Field, 16 W. Res. L. Rev. 131, 150-51 (1964); Note, Antitrust and the Stock Exchange: Minimum Commission or Free Competition? 18 STAN. L. REV. 213, 224-25 (1965).

maintain a schedule of minimum rates."[4] It was not decided "whether a particular schedule or whether certain related practices were susceptible to attack under the antitrust laws." (See Chairman Cohen's speech, *supra*). In other words while the particular practice might not be illegal *per se* it could still be subject to the antitrust law. "In my view," continued Chairman Cohen, "*It would be a mistake* to read the decisions . . . as meaning that stock exchanges are free to fix prices for services without worrying about the national policies reflected in the antitrust laws." (Emphasis added)

Chairman Cohen's statements appear to sound an alarm for this Court to grant this petition for a rehearing in order that the decisions below can be corrected and limitations of the implied exemption from the antitrust laws, if any, be precisely drawn.[5] Indeed, re-

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[4] This point of fixing *minimum* rates is still open to criticism for it does not square with the legislative history. See petition for certiorari at p. 41. See also, Hearings on Stock Exchange Practice before the Senate Committee on Banking and Currency, 73 Cong. 1st and 2nd Session pp. 6432, 6467, 7705, 7483-84, 7752-57. The bill conferred regulatory authority to fix the method of fixing "uniform" rates of commission. In Committee it was argued that uniform rates would permit exchanges to charge "All that the traffic will bear" for the commission could only alter rates if they were inconsistent. Thereafter the word "uniform" was replaced by "*reasonable*".

[5] The Chairman is well aware that the antitrust laws have applicability and utility in the context of an already regulated industry. *See* Hale & Hale, *Competition or Control I; The Chaos in the Cases*, 106 U. PA. L. REV. 641 (1958); Hale & Hale, *Competition or Control II; Radio & Television Broadcasting*, 107 U. PA. L. REV. 585 (1959); Hale & Hale, *Competition or Control III; Motor Carriers*, 108 U. PA. L. REV. 775 (1960); Hale & Hale, *Competition or Control IV; Air Carriers*, 109 U. PA. L. REV. 311 (1961); Hale & Hale, *Competition or Control V; Production & Distribution of Electrical Energy*, 110 U. PA. L. REV. 57 (1961);

view by this Court would be responsive to the Chief Justice's statement "In my view, this blunderbluss approach falls far short of the close analysis and delicate weighing process mandated by this Court in *Silver.*" *Kaplan* v. *Lehman Brothers, supra.*

II

The Prevailing Uncertainty Left in the Wake of This Court's Refusal to Review Necessitates the Establishment of Guidelines

Another intervening circumstance which necessitates a review of the subject case is the decision rendered by this Court in *Case-Swayne* v. *Sunkist Growers, Inc.* on December 18, 1967. Analysis of that decision brings into focus the uncertainty which has been created by the refusal of the court to review this case. As was stated by the Chief Justice in his dissenting opinion "Without expressing any final view on the merits of the controversy, I am concerned that the law on this subject is to be permitted to lie where it has aimlessly fallen by virtue of the scanty opinion below." *Kaplan* v. *Lehman,* —— U.S. ——, 19 Led. 2d 365, 367.

In *Case-Swayne,* the Court was called upon to construe the express grant of immunity from the antitrust laws provided for in Section 1 of the Capper-Volstead Act.

That decision reaffirms the controlling principle that even where there is an express exemption from the antitrust laws, the manner in which the exemption is

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Hale & Hale, *Competition or Control VI; Application of the Antitrust Laws to Regulated Industries,* 111 U. PA. L. REV. 46 (1962); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility,* 67 HARV. L. REV. 436 (1954).

employed will be strictly construed.[6] The Court will not permit the dismissal of an action merely because the defense of immunity has been raised, the district court must be permitted to examine the challenged activity to determine whether or not it falls within the precise limitations as to the purpose and breadth of the exemption.[7] See concurring opinion of Mr. Justice White —— U.S. ——, 36 L.W. 4075, 4076. *Cf. Employing Plasterers Assn.* v. *United States,* 347 U.S. 186 (1954).

In refusing to review the decision of the Court of Appeals for the Seventh Circuit in this case the Court has permitted not only an exemption from the antitrust laws but permitted to remain on the books the Seventh Circuit opinion granting total immunity from the prescriptions of the Sherman Act, all contrary to the teaching of *Silver.* Certainly this is an anomalous result in view of the *Case-Swayne* narrow construction of an express exemption, and the Court's long standing position that repeals of the antitrust laws by implication are strongly disfavored. *United States* v. *Philadelphia National Bank,* 374 U.S., 321 (1963).

This Court in *Case-Swayne* did not permit the plaintiff to be thrown out of Court even with an express grant of immunity in view of the gravity of the anti-

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[6] *United States* v. *Borden,* 308 U.S. 188 (1939); *Georgia* v. *Penn. R. Co.,* 324 U.S. 439 (1945); *U.S. Alkali Assn.* v. *United States,* 325 U.S. 196 (1945); *United States* v. *E.I. duPont de Nemours,* 351 U.S. 377 (1956).

[7] Recently this Court granted certiorari in *American Federation of Musicians of United States and Canada, et al.* v. *Carroll,* No. 309 for the purpose of construing the express exemption granted under the Norris-LaGuardia and Clayton Acts. Certainly this is also an intervening circumstance of controlling importance.

trust allegations. By a parity of reasoning it is difficult to reconcile how this Court can now permit the plaintiffs to be thrown out of Court on a motion for summary judgment on the strength of an *implied* immunity and without a consideration of the merits of the case.

It is clear in light of these recent developments that the Court should review the matter if for no other reason than to establish guidelines. If there is an implied exemption from the antitrust laws then the Court should dispel any doubts and should define the scope and perimeter of the exemption. For example, as recently as its decision in *United States* v. *Arnold, Schwin & Co.*, —— U.S. ——, 388 U.S. 365, this Court found it necessary to set forth guidelines with regard to the permissible use of consignment agreements and restraints on use after sale. *Id.* at 374, 376.

Just as it was necessary in *Schwinn* to analyze a prevalent business practice in conflict with the antitrust laws for the purpose of setting the periphery, the instant case demands even more so the Court's attention. ". . . [t]he claims advanced by petitioners raise important questions not only as to the compatibility of the Exchange's rate-fixing practice with this Nation's commitment, embodied in the antitrust laws, to competitive pricing, but also to the fulfillment of the goal of investor protection embodied in the securities laws." *Kaplan* v. *Lehman, supra,* at 367.

The need for guidelines in this area is critical for the practice of fixing minimum commission rates is the fount and origin of give ups, a form of reciprocal dealing. See Petition for Certiorari at pp. 23-24.

In recent hearings before the House Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce to amend the Investment Act of 1940 and the Investment Advisers Act of 1940, Chairman Cohen, stated the manner in which give-ups operate and he reflected in response to questioning a dissatisfaction with the practice. The Chairman also expressed serious doubt as to the SEC's authority to direct the flow of give-ups. (Tr. 151-152. Yet Mr. Haack, President of the NYSE and Mr. Levy, Chairman of the Board of Governors, explained the reciprocal nature of give ups and asserted that "reciprocity is part of the American way of life." (Tr. 584-585). This court in *Federal Trade Commission* v. *Consolidated Foods Corp.,* 380 U.S. 592 (1966) held that reciprocity is one of the congeries of antitrust practices at which the antitrust laws are aimed. See also *United States* v. *General Dynamics Corp.,* 258 F. Supp. 36 (S.D.N.Y. 1966). The concept of reciprocity injects into the competitive milieu the prospect of substantial harm as a consequence of leverage and other alien market factors.[8]

The hearings before the House Subcommittee demonstrate the need for immediate action by the Court to define the scope and nature of any implied immunity of the antitrust laws in the area of securities transactions. Suits have been filed in other jurisdictions challenging various exchange practices and calling for examination of the antitrust exemption under other Acts, for example, *Eisen* v. *Carlisle & Jacquelin,* 41 F.R.D. 147 (S.D.N.Y. 1966) involving odd-lot price dif-

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[8] See generally, Kestenbaum, Is Reciprocity Illegal Immoral or Just Fattening, 22 Record of the Association of the Bar of the City of New York 576.

ferentials. In that case a motion to dismiss the suit as a class action had been granted, and the plaintiff appealed. The defendants made a motion to dismiss appeal which was denied 370 F. 2d 119, *cert, denied.*, —— U.S. ——, 19 Led. 2d 598. The appeal on its merits is now pending in the Second Circuit Court of Appeals and was just argued to the Court of Appeals on November 6, 1967.

Similarly *Marnell* v. *United Parcel Service of America, Inc.*, 260 F. Supp. 391 (N.D. Cal. 1966) requires an examination of the antitrust immunity granted by the I.C.C. Act. In that case plaintiff sued for treble damages under Sherman 1. The defendant made motion to dismiss on the ground that the challenged practices were immune from antitrust scrutiny. The court denied the motion. In a well reasoned opinion Judge Sweigert studied the problem of the scope of antitrust immunities, analyzed the decided cases, and arrived at a conclusion directly opposite to that arrived at by the lower courts in the *Kaplan* case. "On no occasion has the Supreme Court held that a federal regulatory act has by implication *completely* displaced the antitrust laws. ". . . [t]he Court, has on two occasions, held that the antitrust laws could not be applied to the precise acts charged in the antitrust suit because of a repugnancy between the antitrust laws and the regulatory statutes governing these acts." Id. at 400. (Emphasis added.)

From these two cases it is apparent that the problems which this case raises for decision will be faced again. It is therefore urged that the Court review the matter now so that guidelines may be established and needless time, expense and litigation spared.

III

There Is Presented a Substantial Ground for Review Not Previously Emphasized Which Is of Controlling Importance

The preceding two points set forth in this petition have demonstrated the conflict and uncertainty which have intervened since the order of this Court denying review and which necessitate the establishment of guidelines. However, there is yet another ground which although not previously stressed by the petitioners is implicit in the petitioners' case and is of a controlling nature. Simply stated, the issue in the instant case is whether after inquiry into the specifics of commission rate structure, rate practices and their impact upon the marketplace, commerce is unreasonably restrained.

The recent decisions of this Court in *United States* v. *Sealy,* —— U.S. ——, 388 U.S. 350 and *United States* v. *Arnold Schwinn Co.,* —— U.S. ——, 388 U.S. 365, bear careful scrutiny. In the Sealy decision it was determined that vertical restrictions on distributors could be reasonable restraints of trade protected by the antitrust laws. However, in that case the Court determined the Sealy arrangement in use for over forty years was a horizontal arrangement among licensees so that the restrictions employed were *per se* illegal. Consequently, it was unnecessary to consider the business or economic justifications, their impact in the marketplace or their reasonableness. The subject case. on the other hand, presents for this Court's determination a consideration of reasonableness of the restraint of fixing minimum commission rates and related practices.

As observed in *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365, 374:

> [S]o here we must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 51 (1911); *Apex Hosiery* v. *Leader*, 310 U.S. 469, 498 (1940).

No such inquiry or close analysis was made. The sweeping exemption from the antitrust laws accorded by the court below swept under the carpet ancillary effects and consequences of fixed rates, i.e. denial of discounts and the practice of reciprocal give-ups of commissions, without so much as taking note of their existence. The refusal to make judicial inquiry does not for a moment change the motive, intent, design and character of the interwoven restraints of commerce embodied in respondents' commission law and practice, nor does the refusal of judicial inquiry diminish the impact of such restraints upon investors. Such restraints are what they are—predatory, invidious, anti-competitive and corruptive, and barring inquiry does not cure them, nor does it vindicate the public's right to have them cured. The summary opinion of the court below invoked an implied antitrust immunity without so much as making a beginning at laying bare the economic and business stuff of rate structure and practices. The blanket immunity conferred, in the name of self-regulation, precluded any weighing process, much less a delicate weighing process, whereby a

crucial distinction might have been made between good faith, arguably justified restraints of commerce embodied in commission law and practice versus restraints which are the product of bad faith and predatory motives and which are patently repugnant to aims and objectives of the Exchange Act, and legitimate limits of self-regulation.

In *Schwinn,* the Court determined that certain consignment practices which might be permissible when engaged in by small companies or companies just breaking into the market could become unreasonable restraints of trade in the hands of dominant companies. This determination is of great importance when carried over to the securities field. It has been called to this Court's attention that only a few brokers receive 50% of all commissions (Petition pp. 11-12.) and dominate the brokerage business. Certainly the challenged practices, even if determined to be exempt from the *per se* test of illegality, could be an unreasonable restraint of trade when it is recalled that members of the New York Stock Exchange transact over 90% of all brokerage business in stocks in the United States. This type of market power is permeated with anticompetitive effects which can only be remedied by this Court granting review and setting forth the operable guidelines of any implied exemption. The denial of certiorari has affirmed the *form* of a statutory scheme, i.e., the Exchange Act, as effecting an implied repeal of the antitrust laws without the barest need to reconcile substantive objectives of both the Exchange Act and the antitrust laws.

CONCLUSION

For the foregoing reasons, the Court should then order review of the matter, vacate the order of November 13, 1967 and invite the Solicitor General and the Securities and Exchange Commission to submit briefs and participate in argument so that the public interest may be fully explored.[9]

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Washington, D. C. 20036

CERTIFICATE OF COUNSEL

I, Anthony Bradley Eben, being the attorney for petitioners do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

ANTHONY BRADLEY EBEN

[9] The petitioners have taken the liberty of transmitting to the Solicitor General and General Counsel of the SEC copies of this Petition for Rehearing.